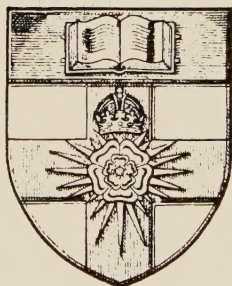


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1896.

THE
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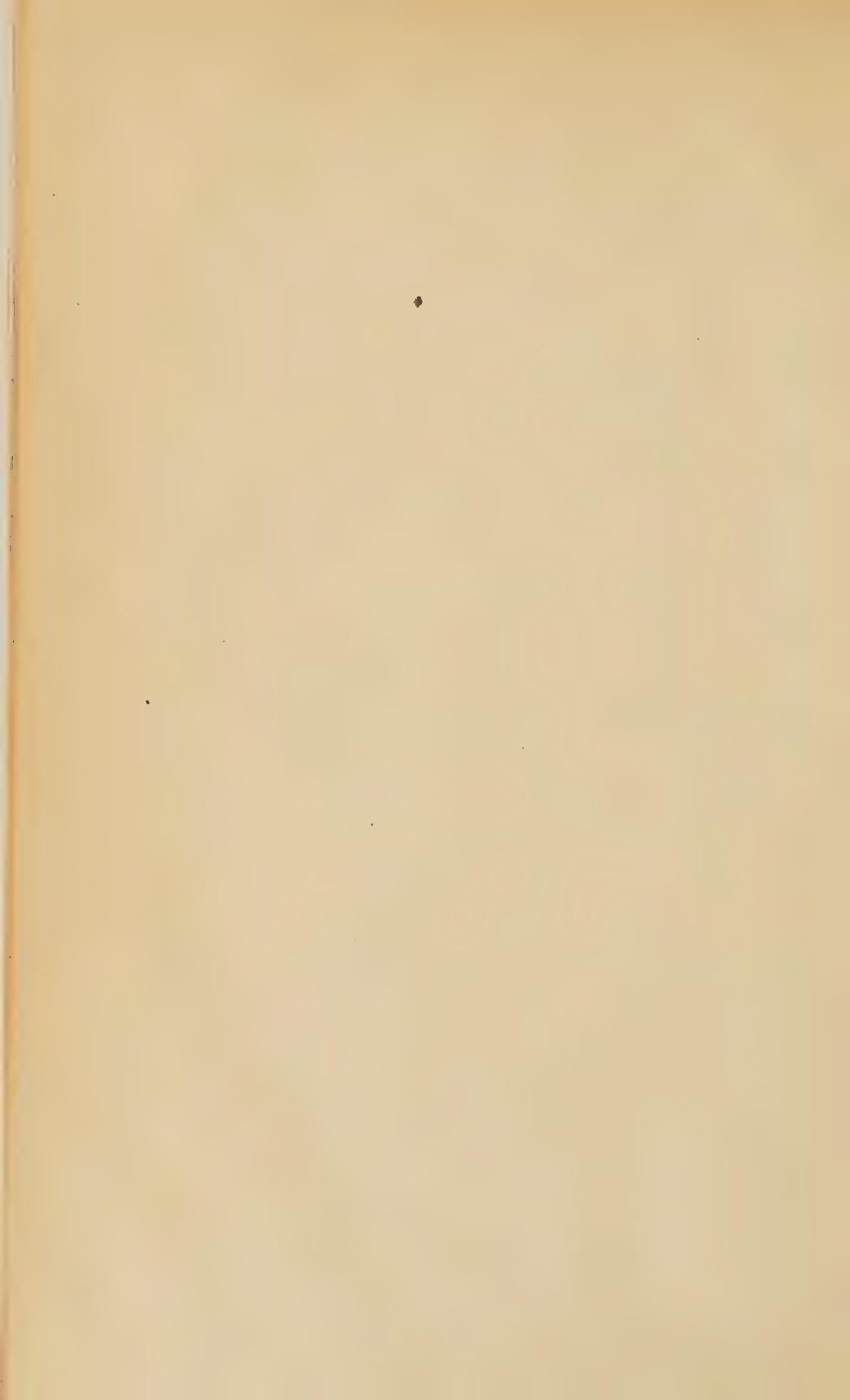
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ERRATA.

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
66	27		Mr. T. A. C. Hampson also-
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A T A B L E

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.			B.		
		PAGE			PAGE
Adcock <i>v.</i> Evans.	<i>In re</i> Allen	345	Battison <i>v.</i> Hobson	— —	403
Akers <i>v.</i> Sears.	<i>In re</i> Gray's		Baylis, <i>In re</i> — —	(C.A.)	107
Settlement — — —	— — —	802	Biggerstaff <i>v.</i> Rowatt's Wharf,		
Albany Hotel Company, Attor-			Limited — —	(C.A.)	93
ney-General <i>v.</i> — (C.A.)		696	Binns, <i>In re.</i> Lee <i>v.</i> Binns	—	584
Allcard <i>v.</i> Walker — — —		369	——, Lee <i>v.</i> <i>In re</i> Binns	—	584
Allen, <i>In re.</i> Adcock <i>v.</i> Evans		345	Birmingham Vinegar Brewery		
Allsopp and Harkness's Contract,			Company, Powell <i>v.</i> (C.A.)		54
<i>In re</i> — — — — —		358	Blackmore, Morton <i>v.</i> <i>In re</i>		
Anderson, Attorney-General <i>v.</i>			Brewer's Settlement — —		503
<i>In re</i> Wood — — —		596	Blades, Wilkinson <i>v.</i> <i>In re</i> Lart		788
Armstrong <i>v.</i> Wilkin. <i>In re</i>			Bloomenthal, <i>Ex parte.</i> <i>In re</i>		
Weeding — — — — —		364	Veuve Monnier et ses Fils,		
Ashby, Hindson <i>v.</i> — (C.A.)		1	Limited — — (C.A.)		525
Attorney-General <i>v.</i> Albany Hotel			"Bovril" Trade-mark, <i>In re</i>		
Company — — (C.A.)		696	(C.A.)		600
<i>v.</i> Anderson.			Brandreth <i>v.</i> Colvin. <i>In re</i> Pit-		
<i>In re</i> Wood — — —		596	cairn — — — —		199

	PAGE
Brewer's Settlement, <i>In re</i> .	
Morton v. Blackmore — —	503
Bruty v. Mackey. <i>In re</i> Buck —	727
Buck, <i>In re</i> . Bruty v. Mackey	727
Bulkeley v. Stephens — —	241
Bullock, Lloyds Bank, Limited v.	192
Burford-Hancock, Malcolm v.	
<i>In re</i> Hancock — (C.A.)	173

C.

Cadogan v. Fitzroy. <i>In re</i> Hamilton — — — (C.A.)	617
Carew, <i>In re</i> . Carew v. Carew (C.A.)	311
—— v. Carew. <i>In re</i> Carew (C.A.)	311
✓ Carmichael's Case. <i>In re</i> Hannan's Empress Gold Mining and Development Company (C.A.)	643
Chapman, <i>In re</i> . Cocks v. Chapman — — — (C.A.)	763
——, Cocks v. <i>In re</i> Chapman — — — (C.A.)	763
Charity Commissioners v. Green. <i>In re</i> Herbage Rents, Greenwich — — —	811
Clarke's Design, <i>In re</i> (C.A.)	38
Clifford v. Gurney. <i>In re</i> Gurney	863
Cock, Prout v. — — —	808
Cocks v. Chapman. <i>In re</i> Chapman — — — (C.A.)	763
Colvin, Brandreth v. <i>In re</i> Pitcairn — — —	199
Concessions Trust, <i>In re</i> . McKay's Case — — —	757
Cook v. Culverhouse. <i>In re</i> Culverhouse — — —	251
Culverhouse, <i>In re</i> . Cook v. Culverhouse — — —	251
——, Cook v. <i>In re</i> Culverhouse — — —	251
Cunnack v. Edwards (C.A.)	679

D.

Dashwood, Norton v. — —	497
Davidson v. Myrtle. <i>In re</i> Smith	590
De Bernardy, Rees v. — —	437
De Hoghton, <i>In re</i> . De Hoghton v. De Hoghton — —	385

De Hoghton v. De Hoghton. <i>In re</i> De Hoghton — —	385
Dellwick's Patent, <i>In re</i> — —	705
Devon's (Earl of) Settled Estates, <i>In re</i> . White v. Devon (Earl of). <i>In re</i> Steer. Steer v. Dobell — — —	562
——, White v. <i>In re</i> Earl of Devon's Settled Estates. <i>In re</i> Steer. Steer v. Dobell	562
Dewhurst & Sons, Limited, <i>In re</i> Trade-mark of — (C.A.)	137
Dibbins v. Dibbins — — —	348
Dobell, Steer v. <i>In re</i> Steer. <i>In re</i> Earl of Devon's Settled Estates. White v. Earl of Devon — — —	562
Doetsch, <i>In re</i> . Matheson v. Ludwig — — —	836
Dyson and Fowke, <i>In re</i> — —	720

E.

Eastman Photographic Materials Company, Staples v. (C.A.)	303
Edwards, Cunnack v. (C.A.)	679
—— v. Walters (C.A.)	157
Ehrmann v. Ehrmann (C.A.)	611
—— v. — — —	826
Elliot, <i>In re</i> . Kelly v. Elliot —	353
——, Kelly v. <i>In re</i> Elliot —	353
Ernest v. Loma Gold Mines, Limited — — —	572
Evans, Adcock v. <i>In re</i> Allen —	345

F.

Farquhar, <i>Ex parte</i> . <i>In re</i> Land Securities Company (C.A.)	320
Filby v. Hounsell — — —	737
Fitzroy, Cadogan v. <i>In re</i> Hamilton — — — (C.A.)	617
Fooks v. Horner. <i>In re</i> Horner	188
Fowke and Dyson, <i>In re</i> — —	720
Frewen v. Law Life Assurance Society — — —	511
Fricker v. Van Grutten (C.A.)	649

G.

Gas Light and Coke Company, Paterson v. — (C.A.)	476
--	-----

	PAGE		PAGE
George & Co., Pitt Pitts v. (C.A.)	866	J.	
Gray's Settlement, <i>In re</i> . Akers		Jackson v. Rainford Coal Com-	
v. Sears - - - - -	802	pany - - - - -	340
Green, Charity Commissioners v.		James, Rudd v. - (C.A.)	554
<i>In re</i> Herbage Rents, Green-			
wich - - - - -	811	K.	
Gurney, <i>In re</i> . Clifford v. Gurney	863	Kelly v. Elliot. <i>In re</i> Elliot -	353
—, Clifford v. <i>In re</i> Gurney	863	Kidderminster (Mayor of),	
		Richards v. - - - - -	212
		— (Overseers of),	
H.		Richards v. - - - - -	212
Hamilton, <i>In re</i> . Cadogan v.		Kingston Cotton Mill Company	
Fitzroy - - - (C.A.)	617	(No. 2), <i>In re</i> - (C.A.)	279
Hampshire Land Company, <i>In re</i>	743	Knight v. Simmonds (C.A.)	294
Hancock, <i>In re</i> . Malcolm v.		König and Ebhardt's Applica-	
Burford-Hancock (C.A.)	173	tion, <i>In re</i> - - - - -	236
Hannan's Empress Gold Mining			
and Development Company, <i>In</i>		L.	
<i>re</i> . Carmichael's Case (C.A.)	643	Land Securities Company, <i>In re</i> .	
Harkin, Robinson v. - - -	415	<i>Ex parte</i> Farquhar (C.A.)	320
Harkness and Allsopp's Contract,		Lart, <i>In re</i> . Wilkinson v.	
<i>In re</i> - - - - -	358	Blades - - - - -	788
Hellard and Bewes, <i>In re</i> - - -	229	Law Life Assurance Society,	
Hemp Yarn and Cordage Com-		Frewen v. - - - - -	511
pany, <i>In re</i> . Hindley's Case		Law Reversionary Interest	
(C.A.)	121	Society, Nobbs v. <i>In re</i>	
Herbage Rents, Greenwich, <i>In re</i> .		Nobbs - - - - -	830
Charity Commissioners v.		Le Brasseur and Oakley, <i>In re</i>	
Green - - - - -	811	(C.A.)	487
Heuland, Hodson v. - - -	428	Lee v. Binns. <i>In re</i> Binns -	584
Higginshaw Mills and Spinning		Lees' Settlement Trusts, <i>In re</i> -	508
Company, <i>In re</i> - (C.A.)	544	Lloyd and North London Rail-	
Hindley's Case. <i>In re</i> Hemp		way (City Branch) Act, 1861	397
Yarn and Cordage Company		Lloyds Bank, Limited v. Bullock	192
(C.A.)	121	Loma Gold Mines, Limited,	
Hindson v. Ashby - (C.A.)	1	Ernest v. - - - - -	572
Hobson, Battison v. - - -	403	Ludwig, Matheson v. <i>In re</i>	
Hodson v. Heuland - - -	428	Doetsch - - - - -	836
Hood Barrs, <i>Ex parte</i> . <i>In re</i>		Lumley, <i>In re</i> . <i>Ex parte</i> Hood	
Lumley - - - (C.A.)	690	Barrs - - - (C.A.)	690
Horn & Francis, <i>In re</i> - - -	797		
Horner, <i>In re</i> . Fooks v. Horner	188	M.	
—, Fooks v. <i>In re</i> Horner	188	Macduff, <i>In re</i> . Macduff v.	
Hornsey District Council v.		Macduff - - - (C.A.)	451
Smith - - - - -	254	— v. Macduff. <i>In re</i>	
Hounsell, Filby v. - - -	737	Macduff - - - (C.A.)	451
How v. Winterton (Earl) (C.A.)	626	McKay's Case. <i>In re</i> Conces-	
Howard v. Rowatt's Wharf,		sions Trust - - - - -	757
Limited - - - (C.A.)	93		
Hunt v. Worsfold - - -	224		

T.		PAGE	PAGE	
Taylor, Phillips, and Rickards' Case. <i>In re</i> National Bank of Wales	— — — —	851	Westminster Brymbo Coal and Coke Company, Whitwham v. (C.A.)	538
Tucker v. Wintle. <i>In re</i> Wintle		711	White v. Devon (Earl of). <i>In re</i> Earl of Devon's Settled Estates. <i>In re</i> Steer. Steer v. Dobell —	562
V.			Whitwham v. Westminster Brymbo Coal and Coke Company — — — (C.A.)	538
Van Grutten, Fricker v. (C.A.)		649	Wilkin, Armstrong v. <i>In re</i> Weeding — — — —	364
Veuve Monnier et ses Fils, Limited, <i>In re. Ex parte</i> Bloomenthal — (C.A.)		525	Wilkinson v. Blades. <i>In re</i> Lart	788
W.			Winterton (Earl), How v. (C.A.)	626
Walker, Allcard v. — — —		369	Wintle, <i>In re</i> . Tucker v. Wintle — — —, Tucker v. <i>In re</i> Wintle	711
Walters, Edwards v. (C.A.)		157	Wood, <i>In re</i> . Attorney-General v. Anderson — — —	596
Ward, <i>In re</i> — — (C.A.)		31	Worsfold, Hunt v. — — —	224
Watkins, <i>In re</i> — — (C.A.)		336	Y.	
Weeding, <i>In re</i> . Armstrong v. Wilkin — — — —		364	Young v. South African and Australian Exploration and Development Syndicate —	268

TABLE OF CASES CITED.

A.

		PAGE
Ackroyd <i>v.</i> Smithson	1 Bro. C. C. 503	597
Agra and Masterman's Bank, In re	L. R. 2 Ch. 391	843
Akerman, In re	[1891] 3 Ch. 212	586
Alabama (State of) <i>v.</i> Georgia (State of)	64 U. S. 505	3
Alcock <i>v.</i> Sloper	2 My. & K. 699	202
Alletson <i>v.</i> Chichester	L. R. 10 C. P. 319	746
Allgood <i>v.</i> Blake	L. R. 8 Ex. 160	314
Ames <i>v.</i> Parkinson	7 Beav. 379	763
Ancona <i>v.</i> Marks	7 H. & N. 686	350
Armstrong, In re	21 Q. B. D. 264	693
Ashmore's Trusts, In re	L. R. 9 Eq. 99	713
Ashton's Case	Dyer, 228 a	390
Attorney-General <i>v.</i> Bolton	3 Anstr. 820	824
_____ <i>v.</i> Chambers	4 De G. & J. 55	4
_____ <i>v.</i> Emerson	[1891] A. C. 649	10
_____ <i>v.</i> Gascoigne	2 My. & K. 647	824
_____ <i>v.</i> Jackson	11 Ves. 365	813
_____ <i>v.</i> Leonard	Not reported	697
_____ <i>v.</i> Moore	[1893] 1 Ch. 676	697
_____ <i>v.</i> Morgan	Not reported	697
_____ <i>v.</i> Naylor	1 H. & M. 809	813
_____ <i>v.</i> Northumberland } (Duke of)	7 Ch. D. 745	680
_____ <i>v.</i> South Eastern Rail- } way Company	Not reported	697
Attorneys and Solicitors Act, 1870, In re	1 Ch. D. 573	443
Audain, Ex parte	42 Ch. D. 1	126
Audley's (Lord) Case	Cro. Eliz. 561	352
Avery <i>v.</i> Griffin	L. R. 6 Eq. 606	359

B.

Bach's Design, In re	42 Ch. D. 661	44
Bacup (Corporation of) <i>v.</i> Smith	44 Ch. D. 395	480
Bahin <i>v.</i> Hughes	31 Ch. D. 390	419
Baker <i>v.</i> Hall	12 Ves. 497	375
_____ <i>v.</i> Monk	4 D. J. & S. 388	441
_____ <i>v.</i> Rawson	45 Ch. D. 519	604
Balkis Consolidated Company <i>v.</i> Tom- } kinson	[1893] A. C. 396	759
Bareham, In re	17 Ch. D. 329	399
Bate <i>v.</i> Hooper.	5 D. M. & G. 338	377
Bathe <i>v.</i> Bank of England	4 K. & J. 564	360
Beaumont's Trusts, Re	32 Beav. 191	620
Beck's Case	L. R. 9 Ch. 392	128, 528
Bedford (Duke of) <i>v.</i> British Museum } (Trustees of)	2 My. & K. 552	298

	PAGE
Belchier, Ex parte	Amb. 218 422
Benham v. Keane	1 J. & H. 685 410
Bentinck v. Penn	12 App. Cas. 652 281
Bentley & Co., Re	69 L. T. (N.S.) 204 124
Benyon v. Benyon	15 P. D. 54 377
Bickerton v. Walker	31 Ch. D. 151 193, 844
Bickley v. Guest	1 Russ. & My. 440 177
Bidwell Brothers, In re	[1893] 1 Ch. 603 572
Bignold, In re	9 Beav. 269 109
Bingham and Parkhurst's Case	Littleton's Rep. 93 823
Birch v. Cropper	14 App. Cas. 525 753
Bird v. Brown	4 Ex. 786 350
— v. Johnson	18 Jur. 976 354
Birmingham (Corporation of) v. Baker	17 Ch. D. 782 256
Bishop v. Balkis Consolidated Company	25 Q. B. D. 512 757
Black & Co.'s Case	L. R. 8 Ch. 254 124
Blackburn and District Benefit Building Society, In re	42 Ch. D. 343 818
Blades v. Blades	1 Eq. C. Ab. 358 410
Bligh v. Tredgett	5 De G. & Sm. 74 657
Bodman, In re	[1891] 3 Ch. 135 366
Bolton Partners v. Lambert	41 Ch. D. 295 128, 348
Bostock v. Blakeney	2 Bro. C. C. 653 244
— v. Floyer	35 Beav. 603 422
Bowden, In re	45 Ch. D. 444 626
Bowditch v. Wakefield Local Board of Health	L. R. 6 Q. B. 567 254
Bradley v. Riches	9 Ch. D. 189 193
Braham v. Bustard	1 H. & M. 447 69
Brediman's Case	6 Rep. 56 b. 820
Bridgewater Navigation Company, In re	39 Ch. D. 1; 14 App. Cas. 525 755
Briggs v. Chamberlain	11 Hare, 69 376
Brighton Arcade Company v. Dowling	L. R. 3 C. P. 175 855
Bristow v. Cormican	3 App. Cas. 641 3
British Farmers' Pure Linseed Cake Company, In re	7 Ch. D. 533; 3 App. Cas. 1004 529
British Museum (Trustees of) v. White	2 S. & S. 594 459
Brocklehurst v. Railway Printing and Publishing Company	W. N. (1884) 70 215
Brocklesby v. Temperance Permanent Building Society	[1895] A. C. 173 193
Brogden, In re	38 Ch. D. 546 771
Brooking, In re	2 Giff. 31 398
Brooshooft's Settlement, In re	42 Ch. D. 250 400
Brown v. Dale	9 Ch. D. 78 680
—, Bayley and Dixon, In re	18 Ch. D. 649 544
Brown's Estate, In re	[1893] 2 Ch. 300 160
Browne v. Freeman	12 W. R. 305 60
— v. Yeall	7 Ves. 50, n. 460
Brussels Palace of Varieties v. Prockter	10 Times L. R. 72 124
Brynmawr Coal and Iron Company, In re	W. N. (1877) 45 274
Buckland v. Butterfield	4 Moore (C. P.) 440 499
Budgett v. Budgett	[1895] 1 Ch. 202 264
Bulkeley v. Stephens	3 N. R. 105 244
Bullock v. Caird	L. R. 10 Q. B. 276 836
Burgess v. Burgess	3 D. M. & G. 896 65
Burgess's Case	15 Ch. D. 507 854
Burkinshaw v. Nicolls	3 App. Cas. 1004 529, 759
Burt, Boulton and Hayward v. Bull	[1895] 1 Q. B. 276 480

	PAGE
Burton <i>v.</i> Mount	2 De G. & Sm. 383 202
Bushby <i>v.</i> Dixon	3 B. & C. 298 814
Buxton <i>v.</i> Buxton	1 My. & Cr. 80 776
Byrch, <i>In re</i>	8 Beav. 124 31

C.

Cahill <i>v.</i> Cahill	8 App. Cas. 420 360
Caloric Engine and Siren Fog Signals Company, <i>In re</i>	52 L. T. (N.S.) 846 572
Campbell <i>v.</i> Bainbridge	L. R. 6 Eq. 269 377
Cape Breton Company <i>v.</i> Fenn	17 Ch. D. 198 662
Carling's Case	1 Ch. D. 115 528
Carlisle (Mayor of) <i>v.</i> Graham	L. R. 4 Ex. 361 12
Carritt <i>v.</i> Real and Personal Advance Company	42 Ch. D. 263 193
Carter <i>v.</i> Carter	[1896] 1 Ch. 62 376
——— <i>v.</i> Green	3 K. & J. 591 621
Carthew, <i>In re</i>	27 Ch. D. 485 233
Cave <i>v.</i> Cave	2 Vern. 508 499
Cheavin <i>v.</i> Walker	5 Ch. D. 850 59
Cherry <i>v.</i> Boulton	4 My. & Cr. 442 586
Chesterfield's (Earl of) Trusts, <i>In re</i>	24 Ch. D. 643 202
Chillingworth <i>v.</i> Chambers	[1896] 1 Ch. 685 425
Chinnery <i>v.</i> Evans	11 H. L. C. 115 481
Christchurch Inclosure Act, <i>In re</i>	[1894] 3 Ch. 209 257
———, <i>In re</i>	38 Ch. D. 520 455
Christie <i>v.</i> Barker	53 L. J. (Q. B.) 537 812
Clark <i>v.</i> Malpas	4 D. F. & J. 401 441
Clark's Trust, <i>In re</i>	1 Ch. D. 497 680, 731
Clarke, <i>In re</i>	18 Ch. D. 160 244
Clayton <i>v.</i> Day	26 Sol. J. 43 80
Clerk <i>v.</i> Laurie	2 H. & N. 199 646
Cleve <i>v.</i> Financial Corporation	L. R. 16 Eq. 363 854
Clive <i>v.</i> Clive	L. R. 7 Ch. 433 691
Cochrane <i>v.</i> Macnish & Son	[1896] A. C. 225 80
Cocks <i>v.</i> Manners	L. R. 12 Eq. 574 474
Codrington <i>v.</i> Codrington	L. R. 7 H. L. 854 375
Coffin <i>v.</i> Cooper	2 Dr. & Sm. 365 177
Collins <i>v.</i> Collins	2 My. & K. 703 202
Collinson <i>v.</i> Pater	2 Russ. & My. 344 680
Colonial Securities Company <i>v.</i> Massey	[1896] 1 Q. B. 38 18
Commings <i>v.</i> Scott	L. R. 20 Eq. 11 739
Commissioners for Special Purposes of the Income Tax <i>v.</i> Pemsel	[1891] A. C. 531 454, 680, 727
Commissioners of Sewers of City of London <i>v.</i> Gellatly	3 Ch. D. 610 791
Compton, <i>In re</i>	30 Ch. D. 15 347
Cook <i>v.</i> Fountain	3 Swans. 585 813
Coombs <i>v.</i> Wilkes	[1891] 3 Ch. 77 739
Coope <i>v.</i> Cresswell	L. R. 2 Ch. 112 164
Cooper <i>v.</i> Ewart	2 Ph. 362 489
——— <i>v.</i> Phibbs	L. R. 2 H. L. 149 378
Cope <i>v.</i> Cope	15 Sim. 118 691
——— <i>v.</i> Wilmot	1 Coll. 396, n. 717
Corcoran, <i>In re</i>	62 L. J. (Ch.) 267; 67 L. T. (N.S.) 754 617, 620
Cory <i>v.</i> Eyre	1 D. J. & S. 149 193

		PAGE
Cotton's Trustees and School Board for London, In re	19 Ch. D. 624	723
County of Gloucester Bank <i>v.</i> Rudry Merthyr Steam and House Coal Colliery Company	[1895] 1 Ch. 629	98
Coventry and Dixon's Case	14 Ch. D. 660	281
Cox <i>v.</i> Bennett	[1891] 1 Ch. 617	691
Croft <i>v.</i> Day	7 Beav. 84	80
Crofts <i>v.</i> Middleton	8 D. M. & G. 192	376
Crowe <i>v.</i> Clay	9 Ex. 604	167
Cunnack <i>v.</i> Edwards	[1896] 2 Ch. 679	727
Cupit <i>v.</i> Jackson	13 Price, 721.	816
Curtis <i>v.</i> Hutton	14 Ves. 537	620
Curwen <i>v.</i> Milburn	42 Ch. D. 424	265
Curzon <i>v.</i> Lomax	5 Esp. 60	3
Cutts <i>v.</i> West	Dyer, fol. 141, b, pl. 47	822

D.

Dalton <i>v.</i> Hayter	7 Beav. 313	832
Daniel <i>v.</i> Warren	2 Y. & C. Ch. 290	202
Dash, Re	57 L. T. (N.S.) 219	313
David, Re	30 Beav. 278	110
Davies to Jones and Evans, In re	24 Ch. D. 190	723
Davis <i>v.</i> Angel	4 D. F. & J. 524	380
Deeley <i>v.</i> Perkes	[1896] A. C. 496	705
Deeley's Patent, Re	11 Rep. Pat. Cas. 72	706
Densham's Trade-mark, In re	[1895] 2 Ch. 176	603
Derbon, In re	36 W. R. 667	227
Dering <i>v.</i> Winchelsea (Earl of)	1 Cox, 318	426
Detmold, In re	40 Ch. D. 585	505
Devonshire (Duke of) <i>v.</i> Pattinson	20 Q. B. D. 263	3
Dewar <i>v.</i> Brooke	14 Ch. D. 529	715
D'Eyncourt <i>v.</i> Gregory	L. R. 3 Eq. 382	497
Dillon <i>v.</i> Arkins	17 L. R. Ir. 636	366
Dobson <i>v.</i> Waterman	3 Ves. 308, n.	366
Doe <i>v.</i> Goldwin	2 Q. B. 143	350
— <i>v.</i> Mouldsdales	16 M. & W. 689	565
Dolan <i>v.</i> Macdermot	L. R. 3 Ch. 676	454
Dongan's Case	L. R. 8 Ch. 540	124
Drummond and Davie's Contract, In re	[1891] 1 Ch. 524	360
Duffett <i>v.</i> McEvoy	10 App. Cas. 300	110
Dugmore <i>v.</i> Suffield	W. N. (1896) 50 (13)	510
Dunn's Trade-marks, In re	41 Ch. D. 439	140
Dunne <i>v.</i> English	L. R. 18 Eq. 524	414
Dunsh <i>v.</i> Smith	Aleyn's Rep. 62	823

E.

Edmonds <i>v.</i> Blaina Furnaces Company	36 Ch. D. 215	216
Edwards <i>v.</i> Brown	1 Cr. & J. 307	193
— <i>v.</i> Edmonds	34 L. T. (N.S.) 522	591
Ellis <i>v.</i> Dadson	W. N. (1891) 43	557
— <i>v.</i> Selby	1 My. & Cr. 286	453
Elve <i>v.</i> Boyton	[1891] 1 Ch. 501	590
Emanuel and Simmonds, In re	33 Ch. D. 40	797

		PAGE
Emmerson's Case	L. R. 1 Ch. 433	856
England, In re	[1895] 2 Ch. 100, 820	164
Eno v. Dunn	15 App. Cas. 252	142
Evans v. Llewellyn	1 Cox, 333	443
Exhall Coal Mining Company, In re	4 D. J. & S. 377	546

F.

Farbenfabriken Application, In re	[1894] 1 Ch. 645	602
Ferguson v. Gibson	L. R. 14 Eq. 379	347
Field, In re	{ 29 Ch. D. 608; 54 L. J. (Ch.) 661	231, 797, 798
Fitzgerald's Settlement, In re	37 Ch. D. 18	518
Fleming v. Buchanan	3 D. M. & G. 976	568
Foley v. Hill	1 Ph. 399	639
Ford v. Foster	L. R. 7 Ch. 611	60
— v. Lacy	7 H. & N. 151	4
Forest of Dean Coal Mining Company, In re	{ 10 Ch. D. 450	281
Foster v. Dawber	6 Ex. 839	160
— v. Mackinnon	L. R. 4 C. P. 704	193
— v. Wright	4 C. P. D. 438	4
Foveaux, In re	[1895] 2 Ch. 501	459
Fox v. Fox	L. R. 19 Eq. 286	711
Frame v. Dawson	14 Ves. 387	433
Frape, In re	[1893] 2 Ch. 284	107
Freman v. Whitbread	L. R. 1 Eq. 266	244

G.

Gale v. Lewis	{ 9 Q. B. 730; 16 L. J. (Q.B.) 119	743
Gallini v. Noble	3 Mer. 691	366
Garden Gully United Quartz Mining Company v. McLister	{ 1 App. Cas. 39	745
Gardiner's Trusts, In re	33 Ch. D. 590	509
Garrick v. Camden (Lord)	14 Ves. 372	803
Gaskell v. Gosling	[1896] 1 Q. B. 669	480
General Estates Company, In re	L. R. 3 Ch. 758	843
George, In re	44 Ch. D. 627	160
German v. Chapman	7 Ch. D. 271	295
Gifford v. Yarborough (Lord)	5 Bing. 163	13
Gill v. Bagshaw	L. R. 2 Eq. 746	454
Gledhill v. Hunter	14 Ch. D. 492	227
Goodenough, In re	[1895] 2 Ch. 537	202
Goodman v. Saltash (Mayor of)	7 App. Cas. 633	455
Goodtitle v. Herbert	4 T. R. 680	432
Graham v. Campbell	7 Ch. D. 490	699
Grant v. Ellis	9 M. & W. 113	813
Gray, In re	36 Ch. D. 205	366
Great Eastern Railway Company v. Hackney District Board of Works	{ 8 App. Cas. 687	258
Great Northern Railway Company v. Coal Co-operative Society	{ [1896] 1 Ch. 187	216
Green v. Humphreys	26 Ch. D. 474	264
Gregson's Trusts, Re	2 H. & M. 504	399
Greville v. Browne	7 H. L. C. 689	720

		PAGE
Grezier v. Autran	13 Rep. Pat. Cas. 1	67
Griffith v. Blake	27 Ch. D. 474	699
——— v. Paget	6 Ch. D. 511	753
Grimmett v. Grimmett	Amb. 210	620
Grimshaw's Trusts, In re	11 Ch. D. 406	715
Gunter v. Halsey	Amb. 586	433
Guthrie v. Walrond	22 Ch. D. 573	513

H.

Hagedorn v. Oliverson	2 M. & S. 485	350
Hall, In re	2 Jur. (N.S.) 1076	490
Hall and Barker, In re	9 Ch. D. 538	110
Halton v. Foster	L. R. 3 Ch. 505	803
Hambro v. Hambro	[1894] 2 Ch. 564	816
Hamlyn & Co. v. Talisker Distillery	[1894] A. C. 202	838
Hanfstaengl v. American Tobacco Com- pany	[1895] 1 Q. B. 347	871
Hanson v. Graham	6 Ves. 239	718
Harben v. Phillips	23 Ch. D. 14	273
Harding v. Tingey	12 W. R. 684	832
Hargreaves, In re	44 Ch. D. 236	630
Harrington (Countess of) v. Sir W. Atherton	2 D. J. & S. 352	202
Harrison v. Grimwood	12 Beav. 192	714
——— v. Mexican Railway Company	L. R. 19 Eq. 358	341
Hecla Foundry Co. v. Walker, Hunter & Co.	14 App. Cas. 550	39
Heinrichs v. Bastendorff	10 Rep. Pat. Cas. 160	41
Hemming, Ex parte	28 L. T. (O.S.) 144	107
Henry v. Great Northern Railway Com- pany	1 De G. & J. 606	303
Henty v. Wrey	21 Ch. D. 332	396
Henzell, In re	W. N. (1887) 240	723
Hervey v. Hervey	1 Atk. 561	180, 390
Hinves v. Hinves	3 Hare, 609	202
Hitchcock v. Stretton	[1892] 2 Ch. 343	107
Hodges v. Hodges	20 Ch. D. 749	552
Holdsworth v. M'Crea	L. R. 2 H. L. 380	40
Holford v. Bailey	8 Q. B. 1000; 13 Q. B. 426	10, 11
——— v. Hatch	1 Dougl. 183	813
Holland v. King	6 C. B. 727	348
Hollingshead, In re	37 Ch. D. 651	164
Holloway v. Holloway	13 Beav. 209	70
Holthausen, Ex parte	L. R. 9 Ch. 722	837
Hood Barrs v. Cathcart	[1894] 2 Q. B. 559	691
——— v. Heriot	[1896] A. C. 174	691
Horbury Bridge Coal, Iron and Waggon Company, In re	11 Ch. D. 109	273, 577
Hosking v. Phillips	3 Ex. 168	539
Hotchkys, In re	32 Ch. D. 408	513
Hothersall v. Moore	9 Rep. Pat. Cas. 27	40
Howard v. Ingersoll	54 U. S. 381	3
——— v. Patent Ivory Manufacturing Company	38 Ch. D. 156	342
Howe v. Dartmouth (Earl of)	7 Ves. 137 a	199
Huddersfield Banking Co. v. Lister & Sons	[1895] 2 Ch. 273	378

	PAGE
Hughes <i>v.</i> Cook	34 Beav. 407. 832
——— <i>v.</i> Hughes	1 Bro. C. C. 387 391
Hull and Selby Railway Company, <i>In re</i>	5 M. & W. 327 4
Humphreys <i>v.</i> Green	10 Q. B. D. 148 431
Hunter <i>v.</i> Walters	L. R. 7 Ch. 75 193
Hutley <i>v.</i> Hutley	L. R. 8 Q. B. 112 441
Hyatt, <i>In re</i>	38 Ch. D. 609 630
Hyde <i>v.</i> Dallaway	2 Hare, 528 809
——— <i>v.</i> Skinner	2 P. Wms. 196 167

I.

Illingworth <i>v.</i> Cooke	9 Hare, 37 454
Incandescent Gas Light Company <i>v.</i> Sun-	
light Incandescent Gas Lamp Com-	
pany	13 Rep. Pat. Cas. 333 705
Inman <i>v.</i> Wearing	3 De G. & Sm. 729 832
Irby <i>v.</i> Irby	25 Beav. 632 313
Irish Land Commission <i>v.</i> Grant	10 App. Cas. 14 569
Irvine <i>v.</i> Union Bank of Australia	2 App. Cas. 366 746
Isaac <i>v.</i> Hughes	L. R. 9 Eq. 191 177

J.

Jackson <i>v.</i> Krüger	54 L. J. (Q.B.) 446 653
Jacobs <i>v.</i> Rylance	L. R. 17 Eq. 341 313
James <i>v.</i> Allen	3 Mer. 17 453
——— <i>v.</i> Kerr	40 Ch. D. 449 441
——— <i>v.</i> Salter	3 Bing. N. C. 544 565
Jamieson <i>v.</i> Trevelyan	10 Ex. 269 385
Jarman's Estate, <i>In re</i>	8 Ch. D. 584 460
Jarrett <i>v.</i> Hunter	34 Ch. D. 182 739
Jegon <i>v.</i> Vivian	L. R. 6 Ch. 742 538
Jobson, <i>In re</i>	44 Ch. D. 154 712
John Harper & Co. <i>v.</i> Wright and Butler	[1896] 1 Ch. 142 39
Johnson and Tustin, <i>In re</i>	28 Ch. D. 84; 30 Ch. D. 42 331
——— and Weatherall, <i>In re</i>	37 Ch. D. 433 37
——— <i>v.</i> Johnson	2 Coll. 441 205
——— <i>v.</i> Routh	27 L. J. (Ch.) 305 202
Johnston <i>v.</i> Orr Ewing	7 App. Cas. 219 84, 142
Jolland <i>v.</i> Stainbridge	3 Ves. 478 410
Jones <i>v.</i> Brinley	1 East, 1 443
——— <i>v.</i> Clifford	3 Ch. D. 779 378
——— <i>v.</i> Gooday	8 M. & W. 146 539
——— <i>v.</i> James	1 Beav. 307 489
——— <i>v.</i> Williams	2 M. & W. 326 3
——— <i>v.</i> ———	Amb. 651 459

K.

Keep's Trade-mark, <i>In re</i>	26 Ch. D. 187 143
Kelly, <i>Ex parte</i>	31 L. R. Ir. 137 397
Kendall <i>v.</i> Granger	5 Beav. 300 456
Kennedy <i>v.</i> Broun	13 C. B. (N.S.) 677 496
Kensington (Lord) <i>v.</i> Bouverie	7 H. L. C. 557 514

	PAGE
Kent <i>v.</i> Freehold Land and Brickmaking Company	L. R. 3 Ch. 493 . . . 125
Kershaw's Trusts, <i>In re</i>	L. R. 6 Eq. 322 . . . 552
Kettlewell <i>v.</i> Watson	26 Ch. D. 501 . . . 410
King <i>v.</i> Burchell	Amb. 379 . . . 354
— <i>v.</i> Melling	1 Vent. 225 . . . 177
Kingston Cotton Mill Company, <i>In re</i>	[1896] 1 Ch. 6, 331 . . . 283
Kingston's (Duchess of) Case	2 Sm. L. C. 10th ed. p. 713 . . . 791
Klobe, <i>In re</i>	28 Ch. D. 175 . . . 837
Knapp <i>v.</i> Burnaby	9 W. R. 765 . . . 188
Knox <i>v.</i> Gye	L. R. 5 H. L. 656 . . . 639

L.

Lambert <i>v.</i> Austin	{ Cro. Eliz. 332; Owen's Rep. 117 . . . 822
Lancashire Cotton Spinning Company, <i>In re</i>	{ 35 Ch. D. 656 . . . 544
Lancaster, <i>Ex parte</i>	5 Ch. D. 911 . . . 577
Lane, <i>In re</i>	14 Ch. D. 856 . . . 366
La Société Anonyme des Verrieres de l'Etoile, <i>In re</i> Trade-mark of	{ [1894] 2 Ch. 26 . . . 142
Law and Gould, <i>In re</i>	21 Beav. 481 . . . 31
Lazarus <i>v.</i> Charles	L. R. 16 Eq. 117 . . . 40
Leach <i>v.</i> Thomas	7 C. & P. 327 . . . 499
Leaf, Sons & Co.'s Trade-mark, <i>In re</i>	34 Ch. D. 623 . . . 602
Leake <i>v.</i> Robinson	2 Mer. 363 . . . 712
Learoyd <i>v.</i> Whiteley	{ 33 Ch. D. 347; 12 App. Cas. 727 . . . 771
Leeds Estate Building and Investment Company <i>v.</i> Shepherd	{ 36 Ch. D. 787 . . . 282
Leigh <i>v.</i> Jack	5 Ex. D. 264 . . . 5
Le May <i>v.</i> Welch	28 Ch. D. 24 . . . 39
Le Neve <i>v.</i> Le Neve	2 W. & T. 6th ed. p. 26 . . . 410
Leon, <i>In re</i>	[1892] 1 Ch. 348 . . . 510
Leonard and Ellis' Trade-mark, <i>In re</i>	26 Ch. D. 288 . . . 72, 604
Lethbridge <i>v.</i> Mytton	2 B. & Ad. 772 . . . 347
Levy <i>v.</i> Abercorris Slate and Slab Company	{ 37 Ch. D. 260 . . . 216
Lewis <i>v.</i> Allenby	L. R. 10 Eq. 668 . . . 621
— <i>v.</i> Nobbs	8 Ch. D. 591 . . . 419
Lillingston's Case	7 Rep. 38 a . . . 821
Lingard <i>v.</i> Bromley	1 V. & B. 114 . . . 419
Linoileum Manufacturing Company <i>v.</i> Nairn	{ 7 Ch. D. 834 . . . 59
Liverpool Improvement Act, <i>In re</i>	L. R. 5 Eq. 282 . . . 399
Livingstone <i>v.</i> Rawyards Coal Company	5 App. Cas. 25 . . . 542
Llewellyn's Trust, <i>In re</i>	29 Beav. 171 . . . 203
Lloyd <i>v.</i> Ingram	Separately reported in 1868 . . . 29
— <i>v.</i> Nowell	[1895] 2 Ch. 744 . . . 739
Lockhart <i>v.</i> Reilly	1 De G. & J. 464 . . . 426
Lodge <i>v.</i> Prichard	1 D. J. & S. 610 . . . 837
Londesborough (Lord) <i>v.</i> Somerville	19 Beav. 295 . . . 244
London and General Bank, <i>In re</i>	[1895] 2 Ch. 166, 673 . . . 281, 283
London, Chatham and Dover Railway Company <i>v.</i> South Eastern Railway Company	{ [1892] 1 Ch. 120; [1893] A. C. 429 . . . 191
London Joint Stock Bank <i>v.</i> Simmons	{ [1892] A. C. 201 . . . 843

		PAGE.
Long's Settlement, In re	17 W. R. 218	552
Loosemore v. Radford	9 M. & W. 657	347
Lowndes v. Stone	4 Ves. 648	805
Lyon v. Fishmongers' Company	1 App. Cas. 662	3

M.

M'Crea v. Holdsworth	L. R. 6 Ch. 418	52
Macdonald, Sons & Co., In re	[1894] 1 Ch. 89	759
Macleay, In re	L. R. 20 Eq. 186	355
Maddison v. Alderson	8 App. Cas. 467	431
Magdalen Hospital (Governors of) v. Knotts	8 Ch. D. 709	565
Maggi, In re	20 Ch. D. 545	864
Marsden, In re	26 Ch. D. 783	630
—— v. Kent	5 Ch. D. 598	776
Marseilles Extension Railway Company, In re	L. R. 7 Ch. 161	747
Marshall v. Ulleswater Steam Navigation Company	3 B. & S. 732	3
Martin v. Porter	5 M. & W. 351	538
Maude, Ex parte	L. R. 6 Ch. 51	752
Maultby v. Maultby	2 Ir. Ch. Rep. 32	180
May v. Newton	34 Ch. D. 347	791
Medland, In re	41 Ch. D. 476	771
Melachrino v. Melachrino Egyptian Cigarette Company	4 Rep. Pat. Cas. 215	80
Melbourn, Ex parte	L. R. 6 Ch. 64	837
Mellersh v. Brown	45 Ch. D. 225	190
Merchant Shipping Company v. Armitage	L. R. 9 Q. B. 99	190
Milan Tramways Company, In re	25 Ch. D. 587	586
Miller v. Collins	[1896] 1 Ch. 573	376
Millington v. Fox	3 My. & Cr. 338	67
Milne v. Milne	L. R. 2 P. & M. 295	377
Mitchell v. Steward	L. R. 1 Eq. 541	298
Mitchell & Co.'s Trade-mark, In re	28 Ch. D. 666	144
Montgomery v. Thompson	[1891] A. C. 217	60
Moody and Yates' Contract, In re	30 Ch. D. 344	331
—— v. Tree	9 Rep. Pat. Cas. 333	40
Morgan v. Morgan	14 Beav. 72	202
Morice v. Durham (Bishop of)	9 Ves. 399; 10 Ves. 522	453, 463
Morris v. Wilson	5 Jur. (N.S.) 168	737
Moser v. Marsden	13 Rep. Pat. Cas. 24	705
Mosley v. Mosley	5 Ves. 248	180
Mouson & Co. v. Boehm	26 Ch. D. 398	144
Mowatt v. Castle Steel and Iron Works Company	34 Ch. D. 58	845
Mulckern v. Doerks	53 L. J. (Q.B.) 526	224

N.

Nash v. Morley	5 Beav. 177	460
National Debenture and Assets Corporation, In re	[1891] 2 Ch. 505	273
National Provincial Bank of England v. Jackson	33 Ch. D. 1	193

		PAGE
National Wholesale Tea Supply Associa- tion, In re	10 Rep. Pat. Cas. 164	521
New City Constitutional Club Company, In re	34 Ch. D. 646	547
Newbiggin-by-the-Sea Gas Company v. Armstrong	13 Ch. D. 310	649
Newton v. Anglo-Australian Investment, Finance, and Land Company	[1895] A. C. 244	340
Nightingale v. Goulbourn	5 Hare, 484; 2 Ph. 594	454
Northumberland and Durham District Banking Company, In re	2 De G. & J. 357	275
Nottage, In re	[1895] 2 Ch. 657	366
———, In re	[1895] 2 Ch. 649	455
Nunn v. Fabian	L. R. 1 Ch. 35	431
Nurse v. Durnford	13 Ch. D. 764	649

O.

Oak Pits Colliery Company, In re	21 Ch. D. 322	548
Oakes v. Turquand	L. R. 2 H. L. 325	124
Odum v. Thompson	31 L. R. Ir. 394	819
Ognel's Case	4 Rep. 48 b	821
Oldfield v. Preston	3 D. F. & J. 398	680
Olive's Estate, In re	44 Ch. D. 316	400
Onward Building Society, In re	[1893] 1 Q. B. 16	231
———, In re	[1891] 2 Q. B. 463	855
Ooregum Gold Mining Company of India v. Roper	[1892] A. C. 125	528
Opera, Limited, In re	[1891] 3 Ch. 260	99, 222, 670
Ormerod's Case	[1894] 2 Ch. 474	124
Orr v. Newton	2 Cox, 274	773
Owen & Co. v. Cronk	[1895] 1 Q. B. 265	480

P.

Page, In re	[1893] 1 Ch. 304	629
Pain v. Coombs	1 De G. & J. 34	431
Palmer's Trade-mark, In re	24 Ch. D. 504	60
Parbury's Case	[1896] 1 Ch. 100	529, 758
Pardo v. Bingham	L. R. 6 Eq. 485	838
Parker, In re	16 Ch. D. 44	713
Parrott, In re	33 Ch. D. 274	180
Parsons, In re	45 Ch. D. 51	380
Partington, Re	57 L. T. (N.S.) 654	419
Patent Plumbago Crucible Company, In re	7 Rep. Pat. Cas. 282	522
Paterson v. Gas Light and Coke Company	[1896] 2 Ch. 476	665
——— v. Nottingham (Corporation of)	Journal of Gas Lighting, July, 1891	479
Pease v. Pattinson	32 Ch. D. 154	682
Peek v. Matthews	L. R. 3 Eq. 515	298
Pellatt's Case	L. R. 2 Ch. 527	124
Pender v. Lushington	6 Ch. D. 70	273
Perry Herrick v. Attwood	2 De G. & J. 21	193, 845
Pertwee v. Townsend	[1896] 2 Q. B. 129	819
Peters v. Lewes and East Grinstead Railway Company	18 Ch. D. 429	723

		PAGE
Phillips <i>v.</i> Homfray	L. R. 6 Ch. 770	538
Phoenix Bessemer Steel Company, In re .	44 L. J. (Ch.) 683	341
Phosphate Sewage Company <i>v.</i> Hartmont	5 Ch. D. 394	446
Pickering <i>v.</i> Pickering	4 My. & Cr. 289	202
Pickup <i>v.</i> Atkinson	4 Hare, 624	202
Pilcher, In re	11 Ch. D. 905	227
Portuguese Consolidated Copper Mines, } In re	45 Ch. D. 16	350
Potter <i>v.</i> Duffield	L. R. 18 Eq. 4	738
Powell's Trade-mark, In re	{ [1893] 2 Ch. 388; [1894] A. C. 8	56, 65
President of the United States of America } <i>v.</i> Drummond	Rolls, May 12, 1838	472
Pride <i>v.</i> Bubb	L. R. 7 Ch. 64	376
Priestman <i>v.</i> Tindall	24 Beav. 244	426
Prole <i>v.</i> Soady	L. R. 3 Ch. 220	374
Pulsford <i>v.</i> Hunter	3 Bro. C. C. 416	713
Purves <i>v.</i> Landell	12 Cl. & F. 91	280

Q.

Quincy, Ex parte	1 Atk. 477, ...	499
----------------------------	-----------------------	-----

R.

Raffety <i>v.</i> King	1 Keen, 601	809
Ravald <i>v.</i> Russell	Younge, 9	809
Read and Greswell's Design, In re .	42 Ch. D. 260	44
— <i>v.</i> Wotton	[1893] 2 Ch. 171	227
Reddaway <i>v.</i> Banham	{ [1895] 1 Q. B. 286; [1896] A. C. 199	59, 61
— <i>v.</i> Bentham Hemp Spinning } Company	[1892] 2 Q. B. 639	65
Reeve <i>v.</i> Berridge	20 Q. B. D. 523	331
Reuss <i>v.</i> Picksley	L. R. 1 Ex. 342	740
Rex <i>v.</i> Box	6 Taunt. 325	164
— <i>v.</i> Yarborough (Lord)	3 B. & C. 91; 5 Bing. 163	4, 28
Reynell <i>v.</i> Sprye	8 Hare, 222; 1 D. M. & G. 660	441
Reynolds <i>v.</i> Howell	L. R. 8 Q. B. 398	649
— <i>v.</i> Meyrick	1 Eden, 48	180
Rice <i>v.</i> Rice	2 Drew. 73	193
Richards, In re	45 Ch. D. 589	193
— <i>v.</i> Kidderminster (Overseers of)	[1896] 2 Ch. 212	664
Right <i>v.</i> Beard	13 East, 210	432
Riley <i>v.</i> Croydon	2 Dr. & Sm. 293	809
River Wear Commissioners <i>v.</i> Adamson.	2 App. Cas. 743	314
Robson, In re	45 Ch. D. 71	231, 797
— <i>v.</i> Eaton	1 T. R. 62	657
Roddam <i>v.</i> Morley	1 De G. & J. 1	164
Rogers <i>v.</i> Driver	16 Q. B. 102	43
— <i>v.</i> Ingham	3 Ch. D. 351	381
Rolland <i>v.</i> Hart	L. R. 6 Ch. 678	409
Romford Canal Company, In re	24 Ch. D. 85	843
Roper <i>v.</i> Williams	T. & R. 18	297
Rorke, Ex parte	[1894] 1 I. R. 146	397
Rosenthal <i>v.</i> Reynolds	9 Rep. Pat. Cas. 189	142
Rosher, In re	26 Ch. D. 801	354

		PAGE
Ross <i>v.</i> Army and Navy Hotel Company	34 Ch. D. 43 . . .	215
Rossiter <i>v.</i> Miller . . .	3 App. Cas. 1124 . . .	739
Rotherham's Trade-mark, In re . . .	14 Ch. D. 585 . . .	144
Rous <i>v.</i> Jackson . . .	29 Ch. D. 521 . . .	565
Rowland <i>v.</i> Witherden . . .	3 Mac. & G. 568 . . .	422
Royal British Bank <i>v.</i> Turquand . . .	6 E. & B. 327 . . .	745
Rudge <i>v.</i> Bowman . . .	L. R. 3 Q. B. 689 . . .	855
Russel <i>v.</i> Buchanan . . .	9 Sim. 167 . . .	489
Russell, Son & Scott, Re . . .	55 L. T. (N.S.) 71 . . .	233
Rymer, In re . . .	[1895] 1 Ch. 19 . . .	475, 731

S.

Sale <i>v.</i> Lambert . . .	L. R. 18 Eq. 1 . . .	739
Sanderson's Trust, In re . . .	3 K. & J. 497 . . .	717
Sandys, Ex parte . . .	42 Ch. D. 98 . . .	529
Sankey Brook Coal Company, In re . . .	L. R. 10 Eq. 381 . . .	341
Sartoris's Estate, In re . . .	[1892] 1 Ch. 11 . . .	505
Saunders <i>v.</i> Wiel . . .	[1893] 1 Q. B. 470 . . .	39
Savage, In re . . .	15 Ch. D. 557 . . .	654
— <i>v.</i> Adam . . .	W. N. (1895) 109 (11) . . .	18
Savery <i>v.</i> Enfield Local Board . . .	[1893] A. C. 218 . . .	797
— <i>v.</i> King . . .	5 H. L. C. 627 . . .	441
Sayers <i>v.</i> Collyer . . .	28 Ch. D. 103 . . .	295
Scholefield <i>v.</i> Redfern . . .	2 Dr. & Sm. 173 . . .	245
Scholes & Sons, In re . . .	32 Ch. D. 245 . . .	654
Scrutton <i>v.</i> Brown . . .	4 B. & C. 485 . . .	5
Searle <i>v.</i> Cooke . . .	43 Ch. D. 519 . . .	812
Secretary of State for War <i>v.</i> Chubb . . .	43 L. T. (N.S.) 83 . . .	696
Sedgwick <i>v.</i> Thomas . . .	48 L. T. (N.S.) 100 . . .	552
Seixo <i>v.</i> Provezende . . .	L. R. 1 Ch. 192 . . .	69
Simple <i>v.</i> London and Birmingham Rail- way Company . . .	9 Sim. 209 . . .	314
Sewell's Estate, In re . . .	L. R. 11 Eq. 80 . . .	203
Seymour <i>v.</i> Courtenay (Lord) . . .	5 Burr. 2815 . . .	10
Sheffield (Earl of) <i>v.</i> London Joint Stock Bank . . .	13 App. Cas. 333 . . .	845
Sheppard <i>v.</i> Scinde, Punjaub and Delhi Railway Company . . .	36 W. R. 1 . . .	753
Sheppard's Corn Malting Company, In re . . .	70 L. T. (N.S.) 3 . . .	753
Sherwood <i>v.</i> Decorative Art Tile Com- pany . . .	4 Rep. Pat. Cas. 207 . . .	40
Shropshire Union Railways and Canal Company <i>v.</i> Reg. . .	L. R. 7 H. L. 496 . . .	192
Siegert <i>v.</i> Findlater . . .	7 Ch. D. 801 . . .	58
Singer Manufacturing Company <i>v.</i> Loog { — <i>v.</i> Wil- son . . .	8 App. Cas. 15; 18 Ch. D. 412 . . .	58, 71
Singleton's Estate, In re . . .	3 App. Cas. 391 . . .	68
Sir Titus Salt, Bart., Sons & Co.'s Appli- cation, In re . . .	9 Jur. (N.S.) 941 . . .	399
Skirving <i>v.</i> Williams . . .	[1894] 3 Ch. 166 . . .	604
Skyring <i>v.</i> Greenwood . . .	24 Beav. 275 . . .	203
Slevin, In re . . .	4 B. & C. 281 . . .	377
Smart <i>v.</i> Sandars . . .	[1891] 2 Ch. 236 . . .	732
Smith, In re . . .	5 C. B. 895 . . .	646
—, In re . . .	4 Beav. 309; 9 Beav. 182 . . .	489, 492
	[1893] 1 Q. B. 323 . . .	479, 667

		PAGE
Smith <i>v.</i> Andrews	[1891] 2 Ch. 678	9
——— <i>v.</i> Campbell	19 Ves. 400	803
——— <i>v.</i> Cooke	[1891] A. C. 297	684
——— <i>v.</i> Day	21 Ch. D. 421	699
——— <i>v.</i> Death	5 Madd. 371	177
——— <i>v.</i> Hull Glass Company	8 C. B. 668; 11 C. B. 897	104
——— <i>v.</i> Kemp	2 Salk. 637	10
Smurthwaite <i>v.</i> Hannay	[1894] A. C. 494	224
Somerset (Duke of) <i>v.</i> Fogwell	5 B. & C. 875	10
Sorresby <i>v.</i> Hollins	9 Mod. 221	620
Speight, In re	22 Ch. D. 727	778
——— <i>v.</i> Gaunt	22 Ch. D. 727; 9 App. Cas. 1	419
Spiller <i>v.</i> Maude	32 Ch. D. 158, n.	682, 732
Sprye <i>v.</i> Porter	7 E. & B. 58	441
Stammers <i>v.</i> Elliott	L. R. 3 Ch. 195	587
Stamp <i>v.</i> Cooke	1 Cox, 234	805
Standard Manufacturing Company, In re	[1891] 1 Ch. 627	99, 215, 670
Stanley <i>v.</i> Jones	7 Bing. 369	441
Stanley's Case	4 D. J. & S. 407	341
Stevens <i>v.</i> Evans	1 W. Bl. 284	669
Stogdon, In re	56 L. J. (Ch.) 420	109
——— <i>v.</i> Lee	[1891] 1 Q. B. 661	691
Stone <i>v.</i> Godfrey	5 D. M. & G. 76	381
Strange <i>v.</i> Brennan	{ 15 Sim. 346; 2 Coop. temp. Cottenham, 1	441, 443
Street, In re	L. R. 10 Eq. 165	109
Strong <i>v.</i> Bird	L. R. 18 Eq. 315	165
Sudeley (Lord) and Baines & Co., In re	[1894] 1 Ch. 334	720
Sumpter <i>v.</i> Cooper	2 B. & Ad. 223	409
Sutton, In re	28 Ch. D. 464	454
Swann <i>v.</i> Fonnereau	3 Ves. 41	621
Swift <i>v.</i> Kelly	24 L. R. Ir. 107, 478	813, 818
Syer <i>v.</i> Gladstone	30 Ch. D. 614; 34 W. R. 565	514
Sykes <i>v.</i> Sykes	3 B. & C. 541	68
Symonds <i>v.</i> Wilkes	13 W. R. 1026	691

T.

Tailby <i>v.</i> Official Receiver	13 App. Cas. 523	376
Talbot's Trade-mark, In re	{ W. N. (1894) 12; 11 Rep. Pat. Cas. 77	604
Taunton <i>v.</i> Warwickshire (Sheriff of)	[1895] 2 Ch. 319	99
Taylor <i>v.</i> Manners	L. R. 1 Ch. 48	164
Tending Union (Guardians of) <i>v.</i> Dow- ton	{ [1891] 3 Ch. 265	257
Thomas <i>v.</i> Brown	1 Q. B. D. 714	738
——— <i>v.</i> Sylvester	L. R. 8 Q. B. 368	634, 812
Thompson, In re	{ [1894] 1 Q. B. 462; 63 L. J. (Q.B.) 187	107
——— <i>v.</i> Montgomery	41 Ch. D. 35; [1891] A. C. 217	70
Thorne <i>v.</i> Heard	{ [1894] 1 Ch. 599; [1895] A. C. 495	634
Thoroughgood's Case	2 Rep. 5 b	193
Thurburn <i>v.</i> Steward	L. R. 3 P. C. 478	838
Tilleard, Re	32 Beav. 476	233
Toppin <i>v.</i> Healey	11 W. R. 466	646
Townsend <i>v.</i> Townsend	1 L. R. Ir. 180	366
Tozier <i>v.</i> Hawkins	15 Q. B. D. 650	226

		PAGE:
Tryon v. National Provident Institution	16 Q. B. D. 678	652
Tullett v. Armstrong	1 Beav. 1	691
Turner v. Hand	27 Beav. 561	110
Turton v. Turton	42 Ch. D. 128	65

U.

University of London v. Yarrow	24 Beav. 472	621
--------------------------------	--------------	-----

V.

Van Duzer's Trade-mark, In re	34 Ch. D. 623	602
Varley v. Leigh	2 Ex. 446	817
Vawdry v. Geddes	1 Russ. & My. 203	718

W.

Waithman, Ex parte	4 Deac. & Ch. 412	746
Walker v. London Tramways Company	12 Ch. D. 705	557
Walker & Co. v. Scott & Co.	9 Rep. Pat. Cas. 482	39
Walker, Hunter & Co. v. Falkirk Iron Company	4 Rep. Pat. Cas. 390	43
Wall, In re	42 Ch. D. 510	455
—— v. Tomlinson	16 Ves. 413	375
Warner v. Willington	3 Drew. 523	740
Waterhouse v. Jamieson	L. R. 2 H. L., Sc. 29	128, 528
Waterman v. Ayres	39 Ch. D. 29	602
Watson, In re	[1896] 1 Ch. 925	586
—— v. Cave	17 Ch. D. 19	791
—— v. Hayes	5 My. & Cr. 125	713
Wavell, Re	22 Beav. 634	31
Webb v. Earle	L. R. 20 Eq. 556	303
—— v. Whiffin	L. R. 5 H. L. 711	854
Wedgwood Coal and Iron Company, Re	47 L. T. (N.S.) 612	281
West v. Berney	1 Russ. & My. 431	177
——, King and Adams, In re	[1892] 2 Q. B. 102	109
Weymouth and Channel Islands Steam Packet Company, In re	[1891] 1 Ch. 66	752
Whicker v. Hume	7 H. L. C. 124	459
White, In re	[1893] 2 Ch. 41	454
—— v. Neaylon	11 App. Cas. 171	409
Whitehouse, In re	37 Ch. D. 683	586
Whiteley v. Edwards	[1896] 2 Q. B. 48	692
Wilkinson v. Duncan	23 Beav. 469	203
—— v. Gibson	L. R. 4 Eq. 162	374
—— v. Henderson	1 My. & K. 582	836
Willes v. Greenhill	29 Beav. 376	586
Willett and Argenti, In re	W. N. (1889) 66	331
Williams v. Jordan	6 Ch. D. 517	738
—— v. Kershaw	5 Cl. & F. 111, n.	453
Wilmott v. Freehold House Property Company	51 L. T. (N.S.) 552	224
Winter v. Innes	4 My. & Cr. 101	837
Withy v. Mangles	10 Cl. & F. 215	803
Wolmershausen v. Gullick	[1893] 2 Ch. 514	415
Wood, In re	29 Sol. J. 183	552
Woodford Parish v. Parkhurst	Duke on Charitable Uses, p. 70	813

	PAGE.
Worthington <i>v.</i> German	16 W. R. 187 193
Wotherspoon <i>v.</i> Currie	L. R. 5 H. L. 508 65
Wragg's Trade-mark, In re	29 Ch. D. 551 604
Wrexham (Corporation of) <i>v.</i> Tamplin	28 L. T. (N.S.) 761 461
Wright <i>v.</i> Ingle	16 Q. B. D. 379 254
Wyatt <i>v.</i> Barwell	19 Ves. 435 410
Wytcherley <i>v.</i> Andrews	L. R. 2 P. & M. 327 791

Y.

Yetts, Re	33 Beav. 412 31
Young <i>v.</i> Holloway	[1895] P. 87 791
——— <i>v.</i> Macrae	9 Jur. (N.S.) 322 59

Z.

Zouch <i>v.</i> Woolston	2 Burr. 1136. 180, 390
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CASES
 DETERMINED BY THE
CHANCERY DIVISION
 AND IN
LUNACY
 AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

HINDSON v. ASHBY.

[1894 H. 3703.]

River—Riparian Owner—Several Fishery—Accretions.

C. A.

1896

March 13, 16,
17, 19, 20, 31.

The plaintiffs, under an inclosure award made in 1803, were entitled to a piece of land at Wraysbury bounded on one side by the Thames, which is there navigable but not tidal. The land ended in an almost perpendicular bank 5 or 6 ft. high, and the bed of the river reached to its foot, the water often reaching some height above the foot. The defendant was entitled to a several fishery in the river and to the bed of the river. The water of the river, owing to the removal of a weir, sank, and at the foot of the bank a deposit took place forming a strip on which some large trees grew, and which during some part of the year was left dry, but it was overflowed during a considerable part of the year. At the foot of the bank the defendant dug a ditch which he regularly cleaned out for more than twelve years, and afterwards filled it up with concrete so as to make a footpath. The plaintiffs brought an action for an injunction to restrain him from trespassing:—

Held, by Romer J., that whether the strip had ceased to be part of the bed of the river was a question to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations of the river, the nature of the land, and its growths and user, and that, in the present case, the strip had ceased to be part of the bed and belonged to the plaintiffs as having been formed by gradual accretion to their land:

Held, on appeal, that the principle on which Romer J. had proceeded in determining whether the strip was part of the bed of the river was sound, but that on the facts the strip had not ceased to form part of the bed, and therefore belonged to the defendant: but that when it was dry the

C. A.
1896
HINDSON
v.
ASHBY.
—

rights of the plaintiffs as riparian proprietors were not affected, and they had right of access over it to the water, and could use it to the same extent as they could use the bed of the river in its old state.

Whether the accretions, if they had ceased to form part of the bed of the river, would have been the property of the plaintiffs as owners of the adjoining land, *quære*.

Whether the doctrine of accretion could apply in a case where the steep 6 ft. bank which formed the original boundary between the lands of the plaintiffs and defendant still remained clearly defined, *quære*.

THIS was an appeal by the defendant from a judgment of Romer J. (1)

The plaintiffs, under an award made in 1803, were owners of a piece of land bounded on one side by the River Thames, at a part where it is navigable but not tidal. The defendant was owner of a fishery in that part of the river which adjoined the plaintiffs' land, and was entitled to the bed of the river. The plaintiffs' land towards the river ended in a steep and nearly perpendicular bank 5 or 6 ft. high, so that unless the river was very full there was a drop of 5 or 6 ft. from the surface of the plaintiffs' land to the water. The water of the river sank owing to the removal of a weir, and a deposit was gradually formed at the foot of the bank, which deposit was often under water, but was often dry and formed a strip upon which some large trees grew. The defendant dug a ditch at the foot of the plaintiffs' bank and cleared it out yearly for more than twelve years, after which he filled it up with concrete so as to make a path. The plaintiffs brought their action to restrain this proceeding as being a trespass.

Romer J. held that this strip had ceased to be part of the bed of the river, and, having been formed by gradual deposit, had become by way of accretions part of the plaintiffs' land, and gave a judgment containing a declaration to that effect, and giving liberty to apply to enforce the declaration if necessary.

The defendant appealed.

Crackanthorpe, Q.C., Bucknill, Q.C., and Stuart Moore, for the appellant. The appellant is the owner of a several fishery in a part of the River Thames extending each way beyond the

boundaries of the respondents' land, and of the whole bed of that part of the river. As such he is entitled to an injunction to restrain trespass on his rights: *Marshall v. Ulleswater Steam Navigation Co.* (1); and there is no question in this case as to the riparian proprietors being owners of the river bed usque ad medium filum. The subsidence which has taken place is natural; the river is still in its old bed; and the strip of land in question was originally part, and has never ceased to be part, of the bed of the river. The inclosure award of 1803, under which the respondents claim, was an award of a definite circumscribed area; and where the boundaries of land are ascertained and well known, the law of accretion has no application whatever: *Duke of Devonshire v. Pattinson* (2); *Marshall v. Ulleswater Steam Navigation Co.* (1). Nor has it any application where, as here, the stream of the river has a channel differing in the summer from that occupied by it in the winter. Between riparian proprietors, as the bed of the river shifts, so does the property in it, and the land in question must be in contact with the flow of the stream, otherwise the owner is not riparian proprietor; but that is a principle which does not apply as against the owner of the bed of the river. The owner of the bed of the river does not cease to be the owner because during the summer months the bed is not always covered by water. Evidence of acts of ownership in the river generally are admissible in favour of the appellant as to a particular part: *Jones v. Williams* (3), quoted in *Bristow v. Cormican*. (4) The appellant's acts of ownership are such as to maintain his original boundary in the bed of the river: *Curzon v. Lomax*. (5) If this land is river bed and the respondents are riparian owners the appellant can do anything he likes with the bed so long as he does not obstruct the water: *Lyon v. Fishmongers' Co.* (6) *Howard v. Ingersoll* (7), cited by Romer J., does not apply to this case. The decision in *State of Alabama v. State of Georgia* (8)

C. A.
1896.
HINDSON
v.
ASHBY.

(1) 3 B. & S. 732.

(2) 20 Q. B. D. 263.

(3) 2 M. & W. 326.

(4) 3 App. Cas. 641, 670.

(5) 5 Esp. 60.

(6) 1 App. Cas. 662, 683.

(7) 54 U. S. 381, 427. The head-note in *Howard v. Ingersoll* in 54 U. S. states the result of the case inaccurately: it is corrected at p. xii. of 55 U. S.

(8) 64 U. S. 505, 515.

C. A.
1896
HINDSON
v.
ASHBY.
—

was that the bed of a river is that which is alternately covered or left bare as the water rises or recedes.

The *jus alluvionis* has no place where the boundary of the land is absolutely defined; and no encroachment and no derelictions can alter a distinct boundary: Bracton and Azo (ed. Selden Soc.) 105; Fleta, book 3, ch. ii. p. 176; 22 Ass. 106, pl. 93. According to these authorities, although there may be a gradual accretion to the land of A., it never will belong to A. if his boundary is known: Hale de Jure Maris, reprinted in Stuart Moore on Foreshore, pp. 371, 381, and referred to in *Ford v. Lacy* (1); *Attorney-General v. Chambers* (2); *Rex v. Lord Yarborough* (3); *In re Hull and Selby Ry. Co.* (4); *Callis on Sewers*, pp. 51, 77.

In *Foster v. Wright* (5) there was a gradual and insensible accretion of alluvium, which distinguishes that case from the present. Here there was a steep bank of 6 ft. high with the water laving it, and the river was suddenly lowered by the removal of the weir. That cannot be called accretion which has been brought about by the hand of man. It is said that once a riparian owner, always a riparian owner. But that is not true. The doctrine of accretion only applies where the accretions have been insensible and the former owner does not resist the encroachment. Here there have been constant acts of ownership by the appellant, while until four days before the issue of the writ no act of ownership was attempted by the respondents, which shews that no idea of accretion had occurred to them. The absence of acts of ownership by the respondents is strong evidence in favour of the possession of the appellant. If by a sudden act a riparian proprietor is cut off from the water he is a riparian owner no longer, although he may still have a right of access to the water. The evidence in this case shews that the strip of land in dispute is still part of the bed of the river; but if it has ceased so to be the appellant has acquired a statutory title to it.

Moulton, Q.C., A. & B. Terrell, and Baden Fuller, for the

(1) 7 H. & N. 151, 156.

(3) 3 B. & C. 91, 106.

(2) 4 De G. & J. 55, 71.

(4) 5 M. & W. 327, 331.

(5) 4 C. P. D. 438.

respondents. If this strip of land is still the bed of the river we are riparian owners, and the appellant is trying to get between us and the river and to deprive us of our position as riparian owners. The boundary of land may be defined by occupation as well as by metes and bounds.

The appellant has exercised no such acts of ownership as have been attributed to him; the respondents' land is a ploughed field, only used for agricultural purposes, and they have had access to the river at all times, and have never been interfered with. The appellant does not allege that he has ever excluded the respondents. Assuming that the bed of the river belongs to the appellant, if this strip of land has become dry land it belongs to the respondents, and every act done upon it by the appellant is a trespass, upon which no right can be founded. Whether the river recedes by diminution of water or by accretion of alluvial soil, and whether the recession is caused by natural or by artificial means, the land gained belongs to the respondents as riparian owners, and it matters not what the appellant has done upon such land, because he has not excluded them: *Attorney-General v. Chambers* (1); *Foster v. Wright* (2); *In re Hull and Selby Ry. Co.* (3) The only qualification is that the accretion must not be caused by the wrongful act of the person claiming the benefit of it. *Leigh v. Jack* (4) goes on the question what acts will prove exclusion. They must be acts by a stranger inconsistent with the purposes for which the owner used the soil, otherwise there is no dispossession. There can be a shifting freehold: *Scrutton v. Brown* (5); and this is recognised in *Attorney-General v. Chambers*. (6)

Crackanthorpe, Q.C., in reply. First, has this strip ceased to be part of the bed of the river? We say that where the boundary is defined the doctrine of accretion does not apply.

[LINDLEY L.J. Is that so where one of the boundaries is the edge of a stream?]

Yes, where there is a definite boundary and not merely a fluctuating water's edge. When the inclosure was made the

C. A.
1896
HINDSON
v.
ASHBY.

(1) 4 De G. & J. 55.

(2) 4 C. P. D. 438.

(3) 5 M. & W. 327.

(4) 5 Ex. D. 264.

(5) 4 B. & C. 485, 498.

(6) 4 De G. & J. 67.

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

to a bungalow on an eyot which he claims as his, and the ownership of which is not in dispute. The mud from this ditch has always been thrown on the river side of it, and has helped to raise the mud which kept gradually accumulating on the bed of the river. The defendant's evidence shews that this ditch or grip was cut and kept open to mark the boundary between the bed of the river and the land belonging to the plaintiffs. There is a mass of evidence and much contradiction about this ditch, some witnesses even denying its existence. But it is impossible to believe this, and I take the truth to be what I have stated.

In 1877 or 1878 a weir known as Penton Hook Weir, and situate at Laleham, some distance down the river, was removed by the Thames Conservators. This caused the water in the river above to fall, and by the plaintiffs' land the fall amounted to about two feet, more or less. This fall in the river increased the distance between the plaintiffs' bank and the water of the river, at least in the summer months. The fall also facilitated the gradual accumulation of mud on what had unquestionably once been the bed of the river. Gradually and by slow degrees the water has receded from the foot of the plaintiffs' bank, and mud has accumulated between the foot of the bank and the water of the river in the summer and autumn months. The strip of land thus formed is dry in summer, but is under water in winter; it is of considerable length, and extends along the banks of the river both above and below the plaintiffs' land. The plaintiffs claim so much of this strip as lies between their land and the water, and they claim it as an accretion to their land. The plaintiffs, however, have never taken possession of this strip or used it as their property. On the other hand, the defendant claims it as part of the bed of the river. He also claims it under the Statute of Limitations by virtue of his possession for twelve years before action brought. Romer J. has decided that the land in dispute has ceased to be the bed of the river, and belongs to the plaintiffs, and from this decision the defendant has appealed.

In order to determine the rights of the parties to this strip of land it is necessary to consider, first, the rights of the plaintiffs, and, secondly, the rights of the defendant.

The owners of the allotment made in 1803 were clearly riparian proprietors, and the river being a public navigable river they had a right as members of the public to use the river as a public highway. They had also as riparian proprietors the right to pass to and fro between the water and their own land, and to pull their boats up from the water on to their own land, and to push them down again from their own land into the water. They had also as riparian proprietors the right to take water from the river provided they did not injure others by so doing. These rights, at least, the allottees acquired, and to these rights, at least, the plaintiffs are now entitled: see *Lyon v. Fishmongers' Co.* (1) The right of navigating a non-tidal river does not, however, entitle the public to fish in it: see *Smith v. Andrews* (2) and the authorities there cited. Consequently, as the defendant's predecessors had an exclusive right to fish in the river where it bounded the allotment, the plaintiffs' predecessors never had as riparian proprietors or otherwise any right to fish in the river either from their own land or in boats. Nor have the plaintiffs ever claimed such right.

As regards the bed of the river, the presumption of ownership in the defendant's predecessors as owners of the several fishery displaces the presumption that would otherwise arise in favour of the riparian proprietors being the owners of the bed of the river usque ad medium filum, as to which see *Hale de Jure Maris*, ch. i. There is no question here of any right on the part of the Crown to the bed of the river; for at Wraysbury the river, though navigable, is not and never was tidal: *Hale de Jure Maris*, ch. iv. The bed of the river clearly did not pass to the plaintiffs' predecessors by the allotment made in 1803; nor do I see upon what principle they can claim by accretion of mud or lowering of water any soil which, although dry at times, is still, as a matter of fact, bed of the river. Nor do I understand *Romer J.* to be of a different opinion. His judgment proceeds upon the footing that the strip of land in dispute has ceased to be bed of the river. I will consider this presently; but I will first state what I conceive to be the rights of the

C. A.

1896

HINDSON

v.

ASHBY.

Lindley L.J.

(1) 1 App. Cas. 662.

(2) [1891] 2 Ch. 678.

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

to a bungalow on an eyot which he claims as his, and the ownership of which is not in dispute. The mud from this ditch has always been thrown on the river side of it, and has helped to raise the mud which kept gradually accumulating on the bed of the river. The defendant's evidence shews that this ditch or grip was cut and kept open to mark the boundary between the bed of the river and the land belonging to the plaintiffs. There is a mass of evidence and much contradiction about this ditch, some witnesses even denying its existence. But it is impossible to believe this, and I take the truth to be what I have stated.

In 1877 or 1878 a weir known as Penton Hook Weir, and situate at Laleham, some distance down the river, was removed by the Thames Conservators. This caused the water in the river above to fall, and by the plaintiffs' land the fall amounted to about two feet, more or less. This fall in the river increased the distance between the plaintiffs' bank and the water of the river, at least in the summer months. The fall also facilitated the gradual accumulation of mud on what had unquestionably once been the bed of the river. Gradually and by slow degrees the water has receded from the foot of the plaintiffs' bank, and mud has accumulated between the foot of the bank and the water of the river in the summer and autumn months. The strip of land thus formed is dry in summer, but is under water in winter; it is of considerable length, and extends along the banks of the river both above and below the plaintiffs' land. The plaintiffs claim so much of this strip as lies between their land and the water, and they claim it as an accretion to their land. The plaintiffs, however, have never taken possession of this strip or used it as their property. On the other hand, the defendant claims it as part of the bed of the river. He also claims it under the Statute of Limitations by virtue of his possession for twelve years before action brought. *Romer J.* has decided that the land in dispute has ceased to be the bed of the river, and belongs to the plaintiffs, and from this decision the defendant has appealed.

In order to determine the rights of the parties to this strip of land it is necessary to consider, first, the rights of the plaintiffs, and, secondly, the rights of the defendant.

The owners of the allotment made in 1803 were clearly riparian proprietors, and the river being a public navigable river they had a right as members of the public to use the river as a public highway. They had also as riparian proprietors the right to pass to and fro between the water and their own land, and to pull their boats up from the water on to their own land, and to push them down again from their own land into the water. They had also as riparian proprietors the right to take water from the river provided they did not injure others by so doing. These rights, at least, the allottees acquired, and to these rights, at least, the plaintiffs are now entitled: see *Lyon v. Fishmongers' Co.* (1) The right of navigating a non-tidal river does not, however, entitle the public to fish in it: see *Smith v. Andrews* (2) and the authorities there cited. Consequently, as the defendant's predecessors had an exclusive right to fish in the river where it bounded the allotment, the plaintiffs' predecessors never had as riparian proprietors or otherwise any right to fish in the river either from their own land or in boats. Nor have the plaintiffs ever claimed such right.

As regards the bed of the river, the presumption of ownership in the defendant's predecessors as owners of the several fishery displaces the presumption that would otherwise arise in favour of the riparian proprietors being the owners of the bed of the river usque ad medium filum, as to which see Hale de Jure Maris, ch. i. There is no question here of any right on the part of the Crown to the bed of the river; for at Wraysbury the river, though navigable, is not and never was tidal: Hale de Jure Maris, ch. iv. The bed of the river clearly did not pass to the plaintiffs' predecessors by the allotment made in 1803; nor do I see upon what principle they can claim by accretion of mud or lowering of water any soil which, although dry at times, is still, as a matter of fact, bed of the river. Nor do I understand Romer J. to be of a different opinion. His judgment proceeds upon the footing that the strip of land in dispute has ceased to be bed of the river. I will consider this presently; but I will first state what I conceive to be the rights of the

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

(1) 1 App. Cas. 662.

(2) [1891] 2 Ch. 678.

C. A.
1896
HINDSON
v.
ASHEY.
Lindley L.J.

defendant as owner of a several fishery to the bed of the river within its limits.

Both upon principle and according to the authorities a several fishery may exist in a public navigable river either apart from or as incident to the ownership of the soil over which the river flows. Moreover (according to the law which governed pleadings and forms of action before the Judicature Acts passed), the owner of a several fishery, whether he owned the soil or whether he did not, could maintain trespass for a disturbance of his right of fishery; for, even if he did not own the soil, his several fishery was an incorporeal hereditament and a profit à prendre for the disturbance of which trespass was the appropriate remedy. The authorities on this point are *Smith v. Kemp* (1); *Seymour v. Lord Courtenay* (2); *Holford v. Bailey* (3), in the Exchequer Chamber. See also *Marshall v. Ulleswater Steam Navigation Co.* (4) If the origin of a several fishery is known, if a grant creating it is produced, or its terms can be inferred from those of more recent documents, the terms of that grant will shew whether the grantee is the owner of an incorporeal hereditament only, or whether he is also the owner of the soil of the river in which his right of fishery exists. In *Duke of Somerset v. Fogwell* (5) the terms of a grant of a several fishery in a public navigable and tidal river were inferred to have been such as to have conferred on the grantee an incorporeal hereditament only. If the existence of a several right of fishery is proved, and the owner of the several fishery can also prove that he has so used the soil over which his fishery extends as to give rise to the inference that he is the owner of the soil as well as of the fishery, he will establish his ownership of both. This was the case in *Attorney-General v. Emerson* (6), when a several fishery was established over the foreshore of the Maplin Sands in the estuary of the Thames.

But, further, it must be taken as now settled that, if the right to a several fishery in a public navigable river is proved to exist, the owner of the fishery is to be presumed to be also

(1) 2 Salk. 637.

(2) 5 Burr. 2815.

(3) 13 Q. B. 426.

(4) 3 B. & S. 732.

(5) 5 B. & C. 875.

(6) [1891] A. C. 649.

the owner of the soil over which his fishery extends, unless there is evidence to the contrary. The reasoning on which this presumption is based is not satisfactory, and the difficulties involved in it were very forcibly pointed out by Cockburn C.J. in *Marshall v. Ulleswater Steam Navigation Co.* (1); but the presumption is supported by Mr. Butler in his note to Coke upon Littleton (122*a*); it has the great authority of Bayley J. and the other judges who decided the *Duke of Somerset v. Fogwell* (2); it was deliberately sanctioned by the Court of Queen's Bench and by the Exchequer Chamber in *Holford v. Bailey* (3); it was recognised as law and was acted upon as such by Cockburn C.J. himself and by his colleagues in *Marshall v. Ulleswater Steam Navigation Co.* (1); and, lastly, it was treated by the House of Lords in *Attorney-General v. Emerson* (4) as no longer open to question.

But, treating this presumption as established, what does it involve? Is the owner of a several fishery to be treated as if he were the grantee of a defined strip of land, with all sub-jacent mines and minerals? Or is his presumed ownership of the soil to be limited to the right to make such a use of it as is necessary for the purposes of his fishery? Are the limits of his soil fixed by metes and bounds, or do they change as the bed of the river changes? Again, what are his rights as regards riparian owners? What as regards accretions to the banks or to the bed of the river? And what are his rights as regards soil from which the bed of the river has permanently receded? The answer to all these questions must depend primarily on the real meaning of the doctrine under consideration, and on the extent to which the owner of a several fishery is to be treated as the owner of the bed of the river within the limits of his fishery; and on this subject there is as yet very little authority in our books. *Scrutton v. Brown* (5) is a very important authority to shew that water boundaries of land may fluctuate in law as well as in fact. In *Foster v. Wright* (6) it was decided that the owner of a several fishery had the

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

(1) 3 B. & S. 746.

(2) 5 B. & C. 875.

(3) 8 Q. B. 1000; 13 Q. B. 426.

(4) [1891] A. C. 649.

(5) 4 B. & C. 485.

(6) 4 C. P. D. 438.

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

exclusive right to fish in a river which had gradually encroached upon and into the land of a riparian proprietor, the limits of whose land were known. This decision was, in my opinion, quite right, although in one part of my judgment I may perhaps have gone too far. I am not, however, satisfied that I did, for in that case the river was the boundary. In the *Mayor of Carlisle v. Graham* (1) it was held that the owner of a several fishery, in a part of a river which had been permanently left dry, had no right to fish in an entirely new channel which the river had made for itself in quite a different place. No such questions arise here; but those cases are useful as throwing some light on the rights of owners of several fisheries.

Treating the defendant as the owner of a several fishery, and as presumptively, as well as by admission of the plaintiffs, the owner of the bed of the river within the limits of the fishery, it is very difficult to see how either his rights or those of the riparian proprietors can be affected either by accretions to the bed or by the lowering of the level of the water, so long as the accretions or the soil from which the water has receded are still in fact part of the bed of the river. So long as this is the case, so long will the riparian proprietors continue to be such, and to be entitled to free access to and from their lands to the water across the accretions and soil left dry, and otherwise to use such accretions and soil to the same extent as they were entitled to use the bed of the river before any change in it became observable. On the other hand, in the case supposed, the owner of the several fishery will have the same rights to such accretions and soil, as parts of the bed of the river, as he had to the old bed of the river before any change took place. Moreover, the defendant's acts of ownership go far to shew that he has not yet, at all events, lost his right to the accretions. *Ford v. Lacy* (2) strongly supports his case on this point. Further, during the period of transition from bed of the river to land which no longer answers that description, the Statute of Limitations cannot be invoked by the owner of the several fishery against the riparian proprietors for the purpose of

(1) L. R. 4 Ex. 361.

(2) 7 H. & N. 151.

changing the ownership. The statute cannot begin to run against them in respect of ownership until the right to the soil accrues to them; and this cannot be the case until the land has ceased to be bed of the river, and ceased, therefore, to belong to the owner of the fishery. On this point I agree with Romer J. No doubt if the defendant had excluded the plaintiffs long enough from the use of the land in question the plaintiffs would have lost their rights over it, but there has not been any exclusion proved, and the Statute of Limitations, therefore, is out of the question: see *Leigh v. Jack*. (1)

Whether, apart from the Statute of Limitations, the accretions, or the land left by the water, can become the property of the plaintiffs or cease to be the property of the defendant, is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale de Jure Maris, c. i. and vi., and the Year-book, 22 Ass., fo. 106, pl. 93, to shew that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Rex v. Lord Yarborough* (2), affirmed by the House of Lords in *Gifford v. Lord Yarborough* (3) and *In re Hull and Selby Ry. Co.* (4), seem opposed to those authorities if applied to fluctuating water boundaries. The judgments in *Scratton v. Brown* (5) point in the same direction. On the other hand, *Attorney-General v. Chambers* (6) seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise.

The conclusion at which I have arrived from a careful study of the evidence is that the strip of land in dispute has not yet

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

(1) 5 Ex. D. 264.

(2) 3 B. & C. 91.

(3) 5 Bing. 163.

(4) 5 M. & W. 327.

(5) 4 B. & C. 485, 498, 499, 502, 505.

(6) 4 De G. & J. 55, 71.

C. A.
1896
HINDSON
v.
ASHEY.
Lindley L.J.

ceased to be part of the bed of the river, and has not yet become, even if it ever will become, the property of the plaintiffs. In 1803 the water reached the bank of the river on the plaintiffs' side; so it does now, although not so constantly as then. In summer the water is lower than it used to be, and since 1803 the river shore near the bank has risen from the constant accumulation of silt and mud, aided by willows, osiers, and vegetation. Still this strip of land is under water, except when the river is low. It is not under water only when the water is swollen by an unusual flood: its normal state in winter is under water, and it is under water when the river is well within its old banks. As stated by one of the plaintiffs' own witnesses, the least push of water brings the river over most, if not all, of the land in question. Notwithstanding, therefore, the photographs taken in the autumn of last year, and which shew this strip of land to be dry land covered with vegetation, I cannot come to the conclusion as a matter of fact that the strip in dispute has yet ceased to be bed of the river, and, if it has not, the plaintiffs' claim to it as their land cannot be supported. The defendant still has exclusive fishing rights over it, and the presumption that the soil is his is not rebutted by the fact that there is in summer and autumn less water there than there formerly was. If the doctrine of accretion is to be invoked, the accretion seems to me to be rather on and to the defendant's soil than on or to the soil of the plaintiffs. I do not see how the doctrine of accretion can assist the plaintiffs, so long as the accretion is in fact on what is still bed of the river. I do not propose to examine the evidence which has led me to the above conclusion as to the true state of the strip of land in dispute. My brother Smith has done this very fully in his judgment, and it is unnecessary for me to go over the same ground. I do not differ from the American authority to which Romer J. has referred, as affording criteria for determining what is and what is not bed of a river; but I am unable to concur with Romer J. in his inference from the proved facts. I attach more importance than he did to the history of the case, and to the extent to which the place is still under water. The defendant's acts of ownership, although important from

one point of view, do not throw much, if any, light on the question of fact on which this case really turns. I am of opinion that the appeal must be allowed, and judgment be entered for the defendant, with costs here and below. But I think that our judgment should be prefaced by a declaration that the strip of land claimed by the plaintiffs was, at the time of the commencement of the action, part of the bed of the river, and as such is the property of the defendant, and that the plaintiffs have all the rights of riparian proprietors, so far as their land extends. This declaration will preserve the plaintiffs' rights over the strip of land as part of the bed of the river, and at the same time preserve to the defendant his right to the soil of the bed, including the strip in question.

C. A.
1896
HINDSON
v.
ASHBY.
Lindley L.J.

KAY L.J. The plaintiffs are owners in trust of a piece of agricultural land which was allotted under an inclosure award in 1803 to their predecessors in title, and was described in the award as bounded on the south-west side by the River Thames. This land is on the northern side of the river at Wraysbury, in the county of Bucks, where the river is navigable but not tidal. The land is about 7 ft. above the river bed, and the bank is an irregular slope, upon which grow trees and bushes. The river opposite to the plaintiffs' land is divided into two streams by eyots now forming an island. These eyots belong to the defendant. He has also land on the northern bank adjoining to the plaintiffs' land on the western side, and separated from it by a ditch. The defendant in 1890 built a bungalow on the eastern end of the eyot opposite the plaintiffs' land, and for a convenient access to this bungalow, which is called "The Nest," the defendant has recently made a concrete path at the foot of the bank of the plaintiffs' land, and a bridge of wood from the end of it to "The Nest."

The plaintiffs say that the land on which this path is made is part of the land belonging to them, and they have brought this action against the defendant for this alleged trespass. The learned judge has made a declaration that the land on which the path has been made was and is the plaintiffs' land, and not part of the bed of the river. Against this the defendant appeals.

C. A.
1896
HINDSON
v.
ASHEY.
Kay L.J.

It seems to be admitted that the defendant is owner of a several fishery in this part of the river, and, as such owner, the bed of the river opposite the plaintiffs' land belongs to and is vested in the defendant. The question mainly argued in this case is whether the site of the path is bed of the river. The defendant says that it is. If not, he says it has not become property of the plaintiffs, and he relies on certain acts of ownership which he claims have confirmed his title.

I will consider this last point first. The site of the path was, no doubt, originally part of the river bed. No act of the defendant while it was vested in him as alveus of the river can affect the question. If it has ceased to be river bed there is no evidence when this took place. It cannot be affirmed that it happened more than twelve years before the acts complained of, and, therefore, no other title to it except as bed of the river is established by the defendant in this action. This, as I understand, was the view of the learned judge, and I cannot come on this point to any other conclusion.

The question whether this site is bed of the river is of much more difficulty.

The plaintiffs are bound, in order to maintain an action of trespass like the present, either to prove that they are in actual possession of the land in question, or to establish a title which will sustain the action. There is no evidence of any act of ownership by the plaintiffs on any of the land below the bank. They or their tenants have always cultivated the land above the bank, and they claim that their possession of that land is possession of all the land down to the river. But no actual use or occupation of the land below the bank by the plaintiffs or their predecessors in title is proved by the evidence. However, the plaintiffs contend that the water is their boundary, and that if that boundary gradually shifts by silting up of stream or by its receding, whether from a natural or an artificial cause, their boundary is still the water. Alternatively the plaintiffs say this river has receded by slow and imperceptible degrees, and this has caused an accretion to their land. They contend that the land in question is no longer bed of the river, but dry land, which, by the law of accretion, belongs to the plaintiffs.

There does not seem to be much dispute upon the main facts of the case. *Primâ facie* the defendant, as owner of the fishery, is entitled to the bed of the river. This was a narrow branch of the river. In 1860 or thereabout the defendant's father dug a shallow ditch a foot deep at the foot of the bank of the plaintiffs' land. This was done, it is said, to mark the boundary of the defendant's land. At that time this land was river bed. I suppose it was apprehended that it might some day cease to be so, and this was a precaution taken to preserve the defendant's title to it if that should happen. In my opinion, as I have said, this was useless. Nothing of this kind done in the bed of the river could better the defendant's title or affect that of the plaintiffs. This ditch has been cleaned out from time to time by the defendant since its formation. It had no use except as a boundary. The cement path has been made in this ditch. The small quantity of soil thrown out in cleaning it was put on the side next the stream. A bank seems to have been slowly forming which this soil somewhat increased. On this bank the defendant in 1840, or about that time, planted osiers and willows, some of which have now become large trees, and from time to time he has lopped and trimmed these trees. About 1878 the Thames Conservators removed Penton Hook Weir, which caused the water to sink in this part of the river about two feet. From these causes, but chiefly the last, the river has receded opposite the plaintiffs' land, so that during a great part of the year the bed where this cement path is made is dry land.

The learned judge has found that the site of the cement path is not now part of the river bed. It certainly is a somewhat strange way to use the bed of a river to lay down along it a permanent pathway. This proves, at any rate, that the defendant knows it will be dry land for a great part of the year. The evidence proves that this is the case. How long it is dry is not distinctly shewn; perhaps it would be difficult to estimate this. It must vary with the seasons. This year we are told it has been dry until the rains of this month, which have flooded the river so much that the water is over not only the path, but also the mound of silt between it and the stream beyond.

[His Lordship here read various passages from the evidence

C. A.

1896

HINDSON

v.

ASHBY.

Kay L.J.

of the witnesses in the case as to the extent to which the strip in question was overflowed.]

Photographs were taken by direction of the Court last autumn in the presence of the agents of both parties. Four of them were on the north side of the stream shewing the path. The other two, Nos. 6 and 7, were taken from the eyot on the other side of the stream looking towards the north bank. The water was then very low, the path is strewn with leaves, and the place does not look much like the bed of a river.

This is not so much a question of disputed facts as of the inference to be drawn from facts not in dispute. But the words of Lopes L.J. in *Savage v. Adam* (1), recently adopted by the Court of Appeal in *Colonial Securities Trust Co. v. Massey* (2), apply: "The presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then, inasmuch as the appeal is in the nature of a rehearing, the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below."

Is, then, the case left in doubt? There is a well defined bank at the river end of the plaintiffs' land. Undoubtedly it was formerly the margin of the river bed, which ended at any rate not sooner than the foot of this bank. The river still overflows it and reaches to this bank so as to be, according to the plaintiffs' evidence, from 2 ft. 9 in. to 3 ft. deep in ordinary winter seasons. Sometimes even now the water in flood comes over this bank, which is about 7 ft. above the land at the foot of it. It comes to the foot of this bank, according to the plaintiffs' witness Simmons, "at the least push of water." No doubt the river is lower since the removal of Penton Hook Weir in 1878. Also, the bed has been rising by an accumulation of silt which the defendant has somewhat encouraged. But I cannot come to the conclusion that the site of the defendant's path has ceased to be part of the river bed. I differ from the learned judge with reluctance; but I cannot help thinking he relied too much upon the appearance of the locality as shewn

(1) W. N. (1895) 109 (11).

(2) [1896] 1 Q. B. 38, 40.

in the photographs, and upon the inference to be drawn from the defendant's act in putting down the cement to form the pathway.

Assuming then, as I think, that the land up to the foot of the plaintiffs' bank is still part of the bed of the river, the next question is, what are the relative rights of the parties? The plaintiffs have claimed it as their freehold. That claim fails. The defendant, however, has no other right to the bed of the river than that which he has as owner of the fishery. I do not find any definition of the extent of such a right. It must, in my opinion, be a limited ownership in support and for the purposes of the fishery. Unquestionably any act done by the defendant in the bed of the river which would interfere with the navigation would be illegal. So also would any act which interfered with the access from the plaintiffs' land to the water of the stream adjoining, whether it was low or high. The plaintiffs' right of access over the bed of the river to the water in any state of its flow I think is indisputable. The plaintiffs are riparian proprietors, and while the land up to the foot of the bank is bed of the river any act done by the defendant which would interfere with the rights of the plaintiffs as riparian proprietors would be illegal.

This action is not framed or intended to raise the question whether what the defendant has done in laying down the cement path is an act of this kind. The plaintiffs claim the site of the path as their freehold; and the learned judge states that this was the question which both parties agreed to submit to him at the trial.

I am obliged to differ with respect from the conclusion of the learned judge. I think that the land in question has not ceased to be part of the river bed, but that the bed extends to the bank of the plaintiffs' land.

I think there should be a declaration to this effect, and also that the plaintiffs have all the rights of riparian proprietors on the northern side of the river so far as their land extends.

A. L. SMITH L.J. This is a common law action of trespass, in which the plaintiffs complain that the defendant has broken

C. A.

1896

HINDSON

v.

ASHBY.

Kay L.J.

C. A.

1896

HINDSON

v.

ASHBY.

A. L. Smith L.J.

and entered their close and laid down thereon a concrete footpath. The defendant denies that the land upon which he has laid down this footpath is the land of the plaintiffs, and he also sets up the defence of *liberum tenementum*. The substantial question is whether the land is the land of the plaintiffs.

It was proved that the plaintiffs are riparian proprietors upon the left bank of the River Thames near Staines, which at this part is a non-tidal public navigable river, their predecessors in title having in the year 1803 had awarded to them, as trustees of the Wraysbury Church lands, a piece of arable and meadow land containing 5A. 2R. 8P., bounded on the south-west by the River Thames.

It is not denied that the defendant is owner of a several fishery in the River Thames opposite to the plaintiffs' land, and it is not disputed that upon authority which cannot be questioned—*Holford v. Bailey* (1), *Marshall v. Ulleswater Steam Navigation Co.* (2), and *Attorney-General v. Emerson* (3)—this ownership of the several fishery is evidence of the defendant's ownership of the soil underlying it. The question what acts an owner of a several fishery may or may not perform upon the soil underlying his fishery does not arise in this case, the question being whether the land whereon the defendant has laid down the concrete path is or is not the plaintiffs'.

The plaintiffs being riparian proprietors, and the defendant being owner of the soil of the bed of the river, the question is to where in the year 1894, when this action was brought, did the plaintiffs' land extend—in other words, where did their “ripa” end.

This seems to me so far, *primâ facie*, easy of answer, for where the bed of the river began (the soil of which was the defendant's) there the plaintiffs' “ripa” ended; but where, as a matter of fact, this boundary line was in 1894 is the great question in this case.

If the plaintiffs' land ended upon the river side of the concrete path, then, apart from some further questions which would arise under the Statute of Limitations, the plaintiffs are in the

(1) 13 Q. B. 426, 444.

(2) 3 B. & S. 732.

(3) [1891] A. C. 649, 654, 655.

right ; on the other hand, if it ended upon the land side of this path, the plaintiffs are in the wrong.

The burthen of proof is upon the plaintiffs to shew that in 1894 their land extended to the land in dispute.

My brother Romer came to the conclusion that in 1894 the bed of the river ended outside—i.e., on the river side of the concrete path—and that the land of the plaintiffs therefore embraced the locus in dispute, and he gave judgment for the plaintiffs accordingly.

The learned judge held, and I think quite rightly, that whether a particular spot is or is not part of the bed of a river is one of fact. To help him to decide this question he ordered that photographs should be taken of the locality, and they were taken by the joint surveyors of the plaintiffs and the defendant. After having seen these photographs and heard the case out, the learned judge in his judgment says : “ And but for the fact that this land did formerly form part of the bed of the river, I doubt whether any one would have the boldness to contend that in its present state and under its present conditions it formed part.”

This is a strong statement ; and when I first saw the photographs which the learned judge had had taken, they appeared to me to shew that the learned judge’s conclusion was justified ; and if they had shewn what I may call the average state of things as shewn by the evidence—which I have since found out they do not—they would have been of much more value than they are.

Whilst we were hearing this appeal three other photographs were taken—namely, upon March 19, 1896—and were produced before us. If photographs were anything more than pictures representing a particular place at a particular time I should have thought that these last photographs should not have been looked at ; but as photographs, unless verified upon oath, are not of themselves evidence, we looked at them as mere pictures.

The two sets of photographs shew two entirely different state of things : the one a dry autumn time and no water, the other a wet spring time with water. The latter shew the

C. A.

1896

HINDSON

v.

ASHEY.

A. L. Smith L.J.

C. A.
1896
HENDSON
v.
ASHBY.
A. L. Smith L.J.

water of the river a considerable way up what we know to be the left bank of the Thames, and which bank, in my opinion, plays a very important part in this case. These last photographs, unlike the previous, would lead to the conclusion that the locus in quo was bed of the river on March 19, 1896.

In these circumstances I part with the photographs which shew such totally different scenes, and turn to the evidence upon which this case must be decided, to see how far, in the year 1894, the bed of the river extended, and consequently where the plaintiffs' land ended. The history of this part of the Thames for the last 100 years is by no means left in obscurity.

The evidence shews that in the year 1803 the plaintiffs' field was situated some 6 ft. or so above the river, and at its river end there was a steep sloping bank down to the river, in some places 6 ft. and more, and in other places somewhat less from its top to its foot. This bank I shall hereafter call the 6 ft. bank. This bank has been described by the different witnesses as—a shelving bank, almost perpendicular, not quite; a steep bank; a sloping bank, rather steep, with bramble growing along it; a sloping bank; the ordinary bank, with the wash of the water coming against it.

From the award of 1803, and the plan annexed, it would seem that at this date the bed of the river extended up to this 6 ft. bank, and it is part of the plaintiffs' case that this was so, and no one denies it. The plaintiffs say, and with truth, that they were then—i.e., in 1803—riparian proprietors, which they could not have been unless their land had extended down to the water's edge; for, as Lord Selborne said in *Lyon v. Fishmongers' Co.* (1): "It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream." It is obvious in a river like the Thames, rising, as we know it does, and as the evidence shews, in freshets and floods, and falling again in dry times and droughts, that its waters, when freshets are on, would extend up the face of the 6 ft. bank, and in time of floods, as is the evidence, over the top of this bank; and that in dry times and

droughts the exact opposite would take place, and the waters would dwindle and recede from this bank. That this 6 ft. bank in 1803 was the limit of the plaintiffs' land, and that it was also then the limit of the defendant's soil, I do not doubt.

It is proved that where this bank stood in 1803 there it stands to-day, and it can be seen by any one in exactly the same place and in substantially the same position as of old.

It appears upon the evidence that within living memory the land lying on the riverside of this 6 ft. bank, and upon which the concrete path has been made, was much lower than it is now, and that accumulations have been taking place thereon year by year; that this land used to be more often under water than it is now, and more especially so since some eighteen years ago (1877 and 1878), when the Thames Conservancy did away with Penton Hook Weir, which had the effect of lowering the level of the Thames at this part of the river some eighteen to twenty inches, one witness putting it at thirty inches; but no accurate measurements were made as to this.

It was shewn that as long ago as 1832 Willing Eyot, Chilting Eyot, Billy's Eyot, and Pancake Eyot were in existence, and evidence was given, which I do not doubt is correct, that the planting of these eyots with willows and osiers, which has for years been going on, resulted in the flow of the river at these parts being retarded, the consequence being the silting up of mud and soil brought down by the river; and thus these eyots became enlarged and altered and of different dimensions to what they theretofore had been, and the bed of the river near to its left bank at the spot in dispute thereby became raised.

That the bottom of the river—i.e., the fundus or bed of the river as distinguished from its area and limits—became altered I do not doubt; the question, to my mind, is, Have its area or limits been curtailed?

It was shewn that in 1840 the defendant's father planted willow trees in the bed of the river, which are to be seen there at the present day, outside of the foot of the 6 ft. bank, and it was proved by uncontradicted evidence that these trees had been continuously trimmed by the Ashbys from when they grew up to the present time.

C. A.

1896

HINDSON

v.

ASHBY.

A. L. Smith Esq.

C. A.
 1896
 ~~~~~  
 HINDSON  
 v.  
 ASHEY.  
 ~~~~~  
 A. L. Smith L.J.

It was proved by an overwhelming body of evidence, although there was some contradiction as to this, that in 1860 Mr. Ashby's father had a grip—some call it a ditch—cut when the river was small along the toe of the 6 ft. bank to mark his boundary, and at some places along this bank where the water stood up to this bank he placed stumps for the like purpose.

It was also proved that continuously from 1860 to the present time Mr. Ashby had cleaned out this grip, and had thrown what was dug out of it upon the place where the willow trees which had been planted by his father in 1840 grew. This, together with the continued silting up of the bed of the river around these trees, has created the outside bank at the foot of these willows which now exists.

It was proved that the concrete path was recently made by Mr. Ashby for the convenience of those inhabiting the bungalow which he had built upon his Billy Eyot, so that when the river was low they might get thereto and therefrom dryshod; and it was also proved that this concrete path was made upon part of the site of the old grip or ditch.

That these willow trees when planted in 1840 were planted in the bed of the river as distinguished from dry land is not denied by the plaintiffs—it is part of their case that they were; and that this grip when cut in 1860 was also cut in the then dry bed of the river is clear; and had either the trees been planted or the grip been cut upon land which had then ceased to be part of the bed of the river and had then become dry land, the plaintiffs would, in my judgment, have been met by the Statute of Limitations, which they could not have got over; for it is not suggested by them that they have ever exercised a single act of ownership over the locus in quo, whilst the defendant from 1840 downwards has been exercising the acts above mentioned. It was said that by tilling their field the plaintiffs had exercised acts of ownership over the land in dispute. This is, in my opinion, too far-fetched to be adopted. Unless the defendant had been willing to waive the point, the plaintiffs would have been defeated in this action by reason of their not being able to establish any possessory title whatever upon which to maintain trespass.

Now it must be pointed out, for it is very important, that no evidence has been produced to shew that at any time the waters of the Thames, except as occasioned by the temporary and ordinary vicissitudes of the weather, have receded from their ancient bed, which in 1803, as before stated, extended up to the 6 ft. bank.

It is true that the general level of the waters of the river has been lowered, especially since Penton Hook Weir was abolished, and that for years silting up has taken place around the eyots as they have been planted with willows and osiers, and also adjoining the left bank of the river; but as to the waters of the river having receded so as to constitute an abandonment of the ancient bed and left land derelict has not only not been shewn, but the contrary has been established. What has taken place, to use Lord Selborne's words in *Lyon v. Fishmongers' Co.* (1), has been in "the ordinary and regular course of nature," and not otherwise—that is, when the weather is dry the river recedes, and when the weather is wet the river again reverts up to its old metes and bounds, i.e., to the 6 ft. bank.

The evidence as to this is as follows: [His Lordship gave a summary of the evidence.]

This being the evidence, now comes the question, what constituted the bed of the river in 1894? Was it the same old bed? I mean by that, did it consist of the same old limits, or has the old bed been curtailed, and if so, when and by how much? I take the bed of a river to be where the running water of the river makes its mark. It may be there one moment and back another, and as the rains from heaven descend it will ever and again fill its old accustomed bed.

I will here use the words which I find in an American case to which I have been referred: *State of Alabama v. State of Georgia* (2); for they, in apt language, convey what I mean to express as to what constitutes a bed of a river: "The bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without

C. A.

1896

HINDSON

v.

ASHBY.

A. L. Smith L.J.

(1) 1 App. Cas. 662, 683.

(2) 64 U. S. 515.

C. A. reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."

1896

HINDSON

v.

ASHBY.

A. L. Smith L.J.

If the old bed has been curtailed, as the plaintiffs assert, this must have been brought about either by reason of the receding of the river from part of its ancient bed, so as to leave the land derelict, or by reason of the deposit of alluvion against the plaintiffs' bank, either of which in this case must have occurred since the year 1882, i.e., within twelve years of action, in order to avail the plaintiffs; for otherwise they would be defeated by the Statute of Limitations. The incidents attending, and the distinction between, land derelict and land formed by alluvion are dealt with by Best C.J., in delivering the opinion of the judges in the House of Lords in *Gifford v. Lord Yarborough*. (1) As regards the possibility of an owner of a several fishery having a shifting boundary to his land under his several fishery, Bramwell B., in the case of *Mayor of Carlisle v. Graham* (2), when dealing with a several fishery, says: "The plaintiffs had a several fishery which, no doubt, must have been granted or acquired by metes and bounds; the locus in quo is not within those metes and bounds." If this be the law, then even if the plaintiffs could have established that the Thames had receded from part of its ancient bed, not merely by shrinking and again growing in the ordinary and regular course of nature, but had otherwise done so and left land derelict, it would be adverse to the plaintiffs' contention, that as the river receded so the soil underneath the several fishery of the defendant also became contracted.

It was pointed out by the plaintiffs' counsel that Bayley J. in *Scratton v. Brown* (3), after citing the 1 Inst. 48 b, when dealing with the question as to whether there may be a shifting boundary to land, says: "That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. . . . The Crown by a grant of the seashore would convey, not that which at the time of the grant is between high and low water

(1) 5 Bing. 163.

(2) L. R. 4 Ex. 361, 370.

(3) 4 B. & C. 485, 498.

mark, but that which from time to time shall be between those two termini."

I incline to the opinion that when the water is the boundary this may be so; but whether this is so when such a line of demarcation as the 6 ft. bank exists I do not decide; for there has been no such receding by the waters of the Thames in the present case as to leave land derelict so as to raise the point.

For the reasons above, in my judgment, the plaintiffs have not proved, as they were bound to do to establish this part of their case, that the Thames has receded from part of its ancient bed; but, on the contrary, the evidence shews that it has not.

It was said that the photographs ordered by Romer J. shewed that land vegetation had sprung up and had taken the place of water vegetation upon the locus in dispute, and that this shewed that it had become dry land in 1895, and was consequently not in 1894 the bed of the river. There is not a particle of evidence that this is so; and, speaking for myself, I cannot tell by looking at the photographs whether this be so or not; and even if I could, as I have before said, photographs per se and unverified are no evidence at all.

Being of opinion that the evidence shews that the area of the bed of the Thames extends to where it always has been during the present century—that is, up to the foot of the 6 ft. bank—this, in my judgment, is sufficient to conclude this case in favour of the defendant, and upon this I decide it. But if I am wrong, I must add that I very much doubt if the plaintiffs can invoke the doctrine of accretion as applying to a case where, as here, the old line of demarcation between the plaintiffs' land and the river has always been in existence and still remains patent for all to see. I allude to the old 6 ft. bank.

It cannot be denied that authority is to be found in the books, for instance, in Hale, De Jure Maris, Britton, Fleta, Bracton, the Institutes of Justinian, and the Year Books (all of which will be found referred to by Lindley L.J., when Lindley J., in his judgment in *Foster v. Wright* (1)), and also in the judgment of Chelmsford L.C. in *Attorney-General v. Chambers* (2), *Rex v.*

(1) 4 C. P. D. 438, 447.

(2) 4 De G. & J. 55, 71.

C.A.

1896

HINDSON

v.

ASHBY.

A. L. Smith L.J.

C.A.

1896

HINDSON

v.

ASHEY.

A. L. Smith L.J.

Lord Yarborough (1), and in other cases, which would lead to the conclusion, that in a case with such metes and bounds ever existing as in the present, the doctrine of accretion would not apply.

The case upon which counsel for the plaintiffs relied to shew that although there might be metes and bounds, yet the doctrine of accretion did apply, was that of *Foster v. Wright*. (2) In that case, in which the question was as to whether the owner of a fishery in a river could follow his fishery when the river gradually and imperceptibly changed its course and ate into the soil of another, although after many years the encroachment upon that other's soil could be identified, Lindley J. held that it could be followed; and, if I may be permitted to say so, I agree with him; but that learned judge said: "The change of the bed of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before." This, I would point out, is not so in the present case; for, as before stated, the old 6 ft. bank has been ever standing where it is. There stands the old line of demarcation of the plaintiffs' land, and there it has stood clearly defined whenever the deposit of alluvium by reason of the silting up of sand became such as to be in itself apparent, and then and at that very moment, when the first, and indeed every subsequent accretion, became apparent, so also at the same identical time it became perceptible to the ordinary observer that the accretion so formed was no part of the plaintiffs' land.

This certainly differentiates this case from *Foster v. Wright* (2) in an essential particular; and, as at present advised, I doubt extremely whether the doctrine of accretion applies at all to the present case.

The whole doctrine of accretion is based upon the theory that from day to day, week to week, and month to month a man cannot see where his old line of boundary was by reason of the gradual and imperceptible accretion of alluvium to his land.

(1) 3 B. & C. 91; 5 Bing. 163.

(2) 4 C. P. D. 438, 446.

How can this apply to a case like the present, when the whole thing is at once patent? The late Willes J., in the case of *Lloyd v. Ingram* (1) (the Shoreham foreshore case), there laid down the law of accretion to the jury: "If by gradual and imperceptible accretions in the ordinary course of the operations of nature land is added on by slow degrees to the shore" (*Lloyd v. Ingram* (1) had relation to the seashore; but as to this point, a river stands, in my judgment, upon the same footing), "notwithstanding that after a certain period you may see that a body of land, however considerable, has accrued to the shore, yet if the steps by which that land is formed are steps gradual and in the ordinary course of nature, and happening from time to time, but you cannot perceive the change from step to step (if one may use that figure), then that land so gradually and imperceptibly accrued does belong to the owner of the shore, and is given to him by the law as his property. I say gradual and imperceptible The question is whether the land in question was formed by sudden practical perceptible addition such as ordinary observation would recognise from time to time, or whether it was formed by gradual addition such as ordinary observation would not recognise as from step to step, but as to which from stage to stage you would say, there has been an addition that I can now perceive, to the place in question."

Apply this ruling to the present case. As soon as ever any deposit of alluvion became visible at all, a practical perceptible addition to the plaintiffs' land would at once be recognised by the ordinary observer, and this would be seen, not by stage to stage, but by step to step. As, however, I have not to decide this point, I will say no more about it, excepting that there appear to me to be great obstacles in the plaintiffs' way in maintaining that the doctrine of accretion applies to this case at all.

In my judgment, my brother Romer has been led astray by the photographs he ordered to be taken, and has lost sight of the proved fact of the ancient and still existing boundary, the old 6 ft. bank; and he does not so much as allude to the

(1) Separately reported in 1868.

C. A.
1896
HINDSON
v.
ASHBY.
A. L. Smith L.J.

C. A. fact—which the evidence clearly shews—that what the Thames
 1896 has for the last 100 years been doing and still is doing, as
 ~~~~~ regards its rise and fall to and from the 6 ft. bank, has ever  
 HINDSON been in the ordinary and regular course of nature—both facts, in  
 v. my opinion, of vital importance for the right determination of  
 ASHEY. this case.  
 ———  
 A. L. Smith L.J.

I must take leave to say that, having considered the whole evidence in this case, I have the boldness to assert that in 1894 the site of the concrete path formed part of the ancient bed of the Thames.

The learned judge held that the putting down of the concrete path by the defendant was evidence that the land no longer formed part of the bed of the river, and he said that he suspected that the defendant had done so in order to acquire title to the land.

With all respect, I cannot agree with my brother Romer in either of these suggestions. What the defendant did was to put down this path in the dry bed of the river, so that that bed might be better utilized by passers on foot (when the waters of the river were off it) to and from the bungalow by having a hard, dry path instead of a slimy, slippery, and, at times, muddy one to walk upon.

The plaintiffs are still entitled, as they have ever been since 1803, as riparian owners to access to the river, to contact with its waters as they shrink and grow in the ordinary and regular course of nature: *Lyon v. Fishmongers' Co.* (1), per Lord Selborne. This right they have still; and this right the defendant cannot interfere with. If he does, then I apprehend the plaintiffs may lawfully complain; but I cannot bring myself to hold, as my brother Romer has held, that the soil whereon the concrete path has been placed is the soil of the plaintiffs, for in my opinion it is not; and therefore this action must be dismissed, with costs here and below.

Solicitors: *Soames, Edwards & Jones, for Rowell & Thomas, Rickmansworth; S. Vigers & Richardson.*

(1) 1 App. Cas. 683.

H. C. J.  
 W. W. K.

*In re* WARD.

*Solicitor—Costs—Taxation—Taxation of one of several Bills—Order of Course.*

C. A.  
1896  
NORTH J.  
March 13.

C. A.  
May 8.  
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A solicitor delivered to his clients seven bills of costs, relating to seven different matters in which he had acted for them, together with a cash account which shewed that the seven bills amounted to 261*l.* 15*s.*, and that the solicitor had received 160*l.* on account, leaving a balance of 101*l.* 15*s.* due to him. The clients then paid him a further sum of 50*l.* on account of the balance, he giving a written undertaking "to return to you any sum that may be found due from me on taxation of my bills delivered." The next day the solicitor wrote to the clients that he accepted the 50*l.* in full discharge of all claims by him against them, and asked them to treat the 50*l.* as the balance due on the cash account, and not the 101*l.* 15*s.*

The clients were dissatisfied with one of the bills, which was for 172*l.* 18*s.* 10*d.*, and obtained an order of course for the taxation of that bill alone. After this the clients' new solicitor wrote to the solicitor saying that all the other bills were agreed to and paid, so that this was the only bill outstanding. On a motion by the solicitor to discharge the order for irregularity:—

*Held*, by North J., that, inasmuch as the solicitor had admitted that nothing was due to him, and he could therefore have no lien on the clients' documents, the only question being whether he had been overpaid, the order was not irregular.

*In re Byrch* (8 Beav. 124); *In re Law and Gould* (21 Beav. 481); *Re Wavell* (22 Beav. 634); and *Re Yetts* (33 Beav. 412) distinguished.

An appeal from this decision was dismissed.

MOTION by R. H. Ward, a solicitor, to discharge for irregularity an order of course, dated January 27, 1896, for the taxation of a bill of costs in and about an action in the Chancery Division, *Hand in Hand Investment and Mortgage Co. v. National Dwellings Society*, in which action Ward had acted as solicitor for the plaintiffs.

The order was obtained on the petition of the Hand in Hand Company.

Ward had acted as solicitor for the company in six other distinct matters.

In November, 1895, the company determined to change their solicitor, and they obtained an order in the action appointing H. D. Booth to act as their solicitor in the place of Ward.

C. A.  
1896  
*In re*  
WARD.

On November 16, 1895, a written retainer was given to Booth, as the solicitor of the company, in the action against the National Dwellings Society, and in all other actions and proceedings then pending, in place of Ward; and Ward was thereby required to hand over to Booth all documents and papers belonging to the company. Notice of the change of solicitors and of the retainer of Booth was on the same day served upon Ward.

On November 18, 1895, Ward received the following letter from Booth:—

“On Saturday last my clients handed me 50*l.* I shall be glad, therefore, if you will hand over the whole of the papers to Mr. Edmunds, who brings this letter, and you may accept it as an undertaking on my part to pay you the balance of costs which may be found due to you up to 50*l.*”

Between November 25 and December 19, 1895, Ward handed over to Booth, as solicitor to the company, all the documents and papers belonging to them in all matters and proceedings in which he had acted as their solicitor.

On December 7, 1895, Ward delivered to Booth, as solicitor to the company, seven bills of costs, relating respectively to seven matters in which he had acted for the company, together with a cash account. The bill which related to the action against the National Dwellings Society amounted to 172*l.* 18*s.* 10*d.*

The total amount of the seven bills was 261*l.* 15*s.* The cash account shewed that Ward had received on account of his costs three payments amounting to 160*l.*, and that a balance of 101*l.* 15*s.* remained due to him.

On December 31, 1895, Booth, on behalf of the company, paid to Ward the sum of 50*l.* on account of the balance of 101*l.* 15*s.*, and Ward gave in exchange the following written undertaking:—

“In consideration of your handing to me a cheque for the 50*l.* deposited with you” (i.e. by the company) “I hereby undertake to return to you any sum that may be found due from me on taxation of my bills delivered.”

On January 1, 1896, Ward wrote to Booth as follows:—

“It is not my intention to take any further trouble to obtain payment of any balance that might be found due to me in the



event of a taxation of my bills of costs, and I therefore accept the 50*l.* in full discharge of all claims by me against the company, so far as I am concerned; and you will therefore please treat the 50*l.* as the balance due on the cash account, and not the 101*l.* 15*s.* as appears by the said account."

C. A.  
1896  
~  
*In re*  
WARD.

The company were satisfied with all the bills except that relating to the action. On January 27, 1896, they obtained the common order of course for the taxation of that one bill.

On February 4, 1896, the order was served upon Ward. On February 11 he attended before the taxing master, and offered not to object to the order if the company would, as regarded the costs of the taxation, consent to the other six bills, with the cash account, being considered by the taxing master. The company's solicitor refused to consent to this; and the taxing master adjourned the taxation in order that Ward might apply to discharge the order for taxation.

On February 12 Crook, who was then acting as solicitor for the company in this matter, wrote to Ward:—"It is true that the company employed you in certain matters other than the one now in discussion; but your bills of costs with regard to those other matters are agreed and paid, and there is not and never has been any dispute with respect to them. You have delivered a separate and distinct bill as to the action against the National Dwellings Society, and it is this bill only which is in dispute. It has not been paid; but the moneys you have received from the company after paying off the other bills leave a balance in your hands of 121*l.* 3*s.* 10*d.* as against the disputed bill delivered at 172*l.* 18*s.* 10*d.* . . . No doubt the common order to tax should not be obtained for taxation of one of several bills in dispute, because taxation ought not to be applied for piecemeal. All outstanding bills against a client should be taxed together; but in your case there is no outstanding bill except the one relating to the action by the company against the society. I understand you to raise the points—(1.) that the company should be debarred from saying that the other bills are settled and paid, and (2.) that the bill in dispute cannot be taxed without the bills not in dispute being taxed also. In my view these are unsustainable propositions.



C. A.  
1896  
~~~~~  
In re
WARD.

“P.S.—The notion that a client cannot settle and pay one account and dispute another separate one for wholly different business seems too absurd for serious consideration. Why should not a client pay accounts he is satisfied with? Why should he be compellable to extend the area of dispute to accounts he admits? You have debited the accounts we are satisfied with against the payments made to you. We adopt that, and those accounts are thus paid, leaving one only in dispute to be settled by the taxing master.”

On February 17 Ward gave notice of motion to discharge the order of January 27.

Crook deposed that after Ward's letter of January 1, 1896, the company resolved to agree to all the bills which had been delivered except the bill for 172*l.* 18*s.* 10*d.*, and to tax that one. He further deposed that on February 11, before the taxing master, Ward had proposed that, for the purpose of considering the costs of taxation under the Solicitors Act, the master should take into account the total of the bills, taking the total as the total of the bill to be taxed, and the amount taxed off the one bill as the amount taxed off the aggregate total of all the bills, but that Ward had never offered to have all the bills taxed.

The motion was heard before North J. on March 13, 1896.

Cordery, for Ward. It is irregular to obtain an order of course to tax one of several bills: *In re Byrch* (1); *In re Law and Gould* (2); *Re Wavell* (3); *Re Yetts*. (4)

Beddall, for the company. The order of course contains a direction that the solicitor shall, on payment of what is found due to him on taxation, deliver up all the client's documents which are in his hands. The cases cited only shew that it is irregular to obtain such an order for the taxation of one bill of several, because the effect would be to destroy the solicitor's lien in respect of the other bills. Here the solicitor admits that he makes no further claim, and therefore he has no lien. The

(1) 8 Beav. 124.

(2) 21 Beav. 481.

(3) 22 Beav. 634.

(4) 33 Beav. 412.

only question is whether he has been overpaid. Consequently, the cases cited do not apply.

There is no reason why the clients should be compelled to tax the bills which they do not dispute.

Cordery, in reply. If the letter of January, 1896, operated as payment of the bills, the clients have no right to tax at all unless they can shew special circumstances. The bills are either paid or they are not paid. If they are paid, they are not liable to taxation, except under special circumstances; if they are not paid, they are all open to taxation, and should be taxed together.

NORTH J. In my opinion the order was properly obtained. Seven bills were due from the clients to the solicitor, and it is said that it is not open to the clients to obtain an order of course to tax one of those bills without taxing the others, especially because the order of course contains a direction that "upon payment by the petitioners to the solicitor of what may be certified to be due to him, or in case it shall appear that there is nothing due to him," he is to deliver to the petitioners all deeds, books, papers, and writings belonging to them, although he may have a lien upon those documents or on some of them, in respect of the other bills which are not being taxed.

It is said there is authority which shews in such circumstances an order of course is irregular. There are, no doubt, authorities which shew that when several bills are open and unsettled between a solicitor and his client the client cannot obtain an order of course to tax one without the others. But in the present case the circumstances are very peculiar. The seven bills amounted together to 261*l.* 15*s.* Three payments had been made on account, amounting altogether to 160*l.*, and the cash account shewed that a balance of 101*l.* 15*s.* remained due to the solicitor. The clients wanted to have their papers, and they obtained them from the solicitor on the terms of their paying him 50*l.* more. He handed them over to the clients, and on December 31, 1895, he gave this note to them: "In consideration of your handing to me a cheque for the 50*l.* deposited with you, I hereby undertake to return to you any

C. A.

1896

In re
WARD.

C. A.
1896
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*In re*  
WARD.  
North J.

sum that may be found due from me on taxation of my bills delivered." It was therefore contemplated that there might possibly be a taxation of the bills, and this was an undertaking to hand back any excess which might turn out on the taxation to have been received by the solicitor.

Then the next day the solicitor writes thus: [His Lordship read the letter of January 1, 1896.] So that there he said in effect, "I accept 50*l.* in full. I shall then have received 210*l.*, and I accept that in full satisfaction of all the bills."

That, of course, could not prevent the clients from taxing the bills if they liked. They proceeded to obtain an order of course to tax one bill and not the rest. They accepted the offer which had been made, subject to the taxation of the one bill which the clients did not choose to accept at the amount for which it was delivered. So, if acceptance were necessary, there is sufficient acceptance of the offer made by the solicitor. The result is, that one bill only is being taxed, but all the bills have been paid in full, subject to the solicitor having to repay to the clients (this is the utmost which can be said) any sum which he may have received in excess of his just claim. Upon the solicitor being paid in full the right of the client to have his deeds handed up to him is a matter of course, and I can see no impropriety, therefore, under the circumstances of the present case, in the order being made in that form. In fact, the clients are entitled to say which bill shall be taxed, and the only bill which they choose to select is being taxed. The solicitor cannot complain that he is ordered to deliver up the clients' deeds when something may be due to him, for the only question between the parties was whether he had been exactly paid, or whether he had been overpaid. If anything could be found due to him, I agree that it would be wrong to obtain an order of course containing a direction that on the taxation of one bill all the clients' documents should be given up to him.

But, having regard to the question between the parties here, it seems to me that the order of course was right.

The present case is entirely outside the authorities which were cited by Mr. Cordery.

W. L. C.

The solicitor appealed. The appeal was heard on May 8, 1896.

C. A.

1896

In re

WARD.

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C. A.

*Cordery*, for the appellant. Where a solicitor is employed about several distinct matters, an order of course cannot be obtained for taxation of one of the bills: *In re Byrch*. (1) But my substantial objection is that these bills are one for the purposes of the statute, being bound together by the cash account, and there cannot be an order of course to tax part of a bill. The only distinction between this case and *In re Johnson and Weatherall* (2) is that the bills here are not actually stitched together.

*Beddall*, for the company. Mr. Crook's letter of February 12 shews that all the bills except this one were agreed to by the clients and paid.

LINDLEY L.J. There are seven bills, not one. After the explanation given by Mr. Crook's letter of February 12, a motion to discharge the order of course for irregularity ought not to have been made, for after that letter none of the other bills could be taxed. The appeal must be dismissed with costs.

LOPES L.J. I agree.

KAY L.J. I agree.

Solicitors: *R. H. Ward*; *G. B. Crook*.

(1) 8 Beav. 124.

(2) 37 Ch. D. 433.

H. C. J.



C. A.

*In re* CLARKE'S DESIGN.

1896

[1895 C. 4056.]

April 23, 24;  
May 11.

*Design—Registration—Shape—Patents, Designs, and Trade Marks Act, 1883*  
(46 & 47 Vict. c. 57), ss. 47, 60—*Patents, Designs, and Trade Marks Act,*  
1888 (51 & 52 Vict. c. 50).

C. registered a design for a "Lamp for electric lighting, applicable for its shape." It was, in fact, a design for a lamp-shade, consisting of a reflecting screen which had been commonly used for gas lights, and a ventilating top not materially differing from those which had been used before for gas, except that a chimney which was required for gas lights, but not for electric lights, was omitted:—

*Held* (reversing the decision of North J.), that what C. had registered was substantially the old form of lamp-shade with the omission of the chimney, which was useless when the shade was to be applied to electric lights, and that there was no such originality or novelty in the design as to make it a proper subject of registration.

THIS was an appeal by Julius Sax & Co., Limited, from the refusal of North J. to remove from the register a design registered by J. F. Clarke.

The certificate of registration granted by the comptroller stated that the design No. 206,870 was in February, 1893, registered in class 1 in the name of J. F. Clarke, and that a copyright for five years was granted to him, and that the claim under the heading "Statement of nature of design" was "Lamp for electric lighting, applicable for its shape." Two photographs giving external and internal views of the lamp were registered.

The apparatus in question was intended to be placed outside in front of a shop, and to throw the light through the window upon the goods displayed in it, and was, in fact, a reflector placed outside a lamp, the further side which was turned towards the shop being not inclosed, but allowing free passage of light. The interior formed a reflecting surface. It was not in dispute that this reflecting part was well known and commonly used for gas-lamps in front of shops before the registration. These gas-shades had a ventilating top not generally differing very materially in form from that in the



registered design, and a chimney which projected to a considerable height above the ventilating top.

In 1895 Clarke commenced an action against Sax & Co. for an injunction to restrain them from infringing his registered design, the alleged infringement being the supplying a lamp-shade used with an electric light, having a reflecting part precisely similar to that of Clarke, but having a ventilating top bearing no resemblance to his. Clarke moved for an injunction, and the motion came on to be heard before North J. along with a motion by Sax & Co., under the Patents, Designs, and Trade Marks Act, to expunge Clarke's design from the register.

North J. held that there was sufficient novelty to justify placing the design on the register. His Lordship, therefore, refused the motion of Sax & Co. He also refused the motion for injunction on the ground that the design of Sax & Co. was not an infringement of Clarke's design. Sax & Co. appealed from the refusal of their application.

C. A.  
1896  
~~~~~  
In re
CLARKE'S
DESIGN.
—

Vernon Smith, Q.C., and Church, for the appeal. We ask to have this design taken off the register. This case is governed by *Le May v. Welch*. (1) To entitle a design to be registered there must be a clearly marked and defined difference between it and what has gone before. North J. said that the lantern alone was not novel, but that the top was new, so that there was sufficient novelty to entitle the entirety to be registered. But the registration applies to the design as a whole: *John Harper & Co. v. Wright and Butler* (2); and it cannot be right to register a design as new because a small part is added to what is old, and an omission is made of something which is not wanted for the new purpose.

[KAY L.J. referred to *Saunders v. Wiel* (3), and LOPES L.J. to *Walker & Co. v. Scott & Co.* (4)]

In questions as to registration of design, it is not to be taken into account whether the alleged infringement answers the same purpose: *Hecla Foundry Co. v. Walker, Hunter & Co.* (5),

(1) 28 Ch. D. 24.

(3) [1893] 1 Q. B. 470.

(2) [1896] 1 Ch. 142.

(4) 9 Rep. Pat. Cas. 482.

(5) 14 App. Cas. 550.

C. A.
1896
~
In re
CLARKE'S
DESIGN.
—

the statute having no reference to utility; but there must be something novel or original: *Hothersall v. Moore* (1) The bulk of this design is old, and the ventilating top, which is new, differs very little from some in use before.

[LOPES L.J. Can an obvious combination of old things be registered as a new design?]

Malins V.-C. held it could not: *Lazarus v. Charles*. (2)

[*Moody v. Tree* (3) was referred to.]

If this judgment stands, it will enable dishonest traders to lay traps for honest ones; for the combination as a whole is protected, and an article similar in appearance to the whole will be an infringement, though it may not contain the only point in which this design has any degree of novelty: *Holdsworth v. M'Crea*. (4)

Swinfen Eady, Q.C., and *K. G. Metcalfe*, for Clarke. In *Hecla Foundry Co. v. Walker, Hunter & Co.* (5) the fire-door was registered, and the registration was supported, though there was nothing new but the moulding, and the observations of Lindley L.J. in *Saunders v. Wiel* (6) go on the same lines.

[KAY L.J. If you put a knob of new design on a tea-pot, can you register the whole tea-pot?]

Yes; but what is it that is protected? The tea-pot as thus ornamented. You do not protect every separate part: anybody may make the article if he does not pirate the new part which has been introduced. There may be a new design by a combination of old parts: *Sherwood v. Decorative Art Tile Co.* (7). In *John Harper & Co. v. Wright and Butler* (8) it was argued that the claim of the plaintiffs in that case must be confined to details, and that the details in the articles of the plaintiffs and the defendants were essentially different; but Lord Herschell (9) shewed that the designs might be the same though the details differed.

[LOPES L.J. Here you have claimed the whole design.]

(1) 9 Rep. Pat. Cas. 27.

(2) L. R. 16 Eq. 117.

(3) 9 Rep. Pat. Cas. 333.

(4) L. R. 2 H. L. 380.

(5) 14 App. Cas. 550.

(6) [1893] 1 Q. B. 470.

(7) 4 Rep. Pat. Cas. 207.

(8) [1896] 1 Ch. 142.

(9) [1896] 1 Ch. 148.

There is no provision in the Act as to registration of designs similar to the provisions as to patents which enables the inventor to say that he does not claim particular parts. *Heinrichs v. Bastendorff* (1) shews that a combination of old parts may be registered as a whole. If this appeal be allowed it will be impossible ever to register a design composed of new and old parts.

Vernon Smith, Q.C., in reply. Clarke in his action sought to restrain us from using a lamp-shade the upper part of which is utterly unlike his; so it is plain that he intended to claim the whole design, and every part of it. Not a single authority has been cited which takes this case out of *Le May v. Welch*. (2)

Cur. adv. vult.

May 11. LINDLEY L.J. This is an appeal from the refusal of North J. to expunge from the Register of Designs a design for the shape of an electric lamp. [His Lordship read the certificate of registration.] The design being on the register, it is for those who dispute the propriety of its registration to make out their case, and the applicant here maintains that at the date of registration this design was not new or original, and was well known in the United Kingdom. The question is whether this is proved. Before alluding to the evidence it is necessary to examine the statute which relates to the registration of designs. The Patents, Designs, and Trade Marks Act, 1883, repealed and amended the previous statutes relating to copyright in designs, and replaced them by a series of enactments contained in Parts III. and V. of that Act. These enactments, amended by another Act passed in 1888 (51 & 52 Vict. c. 50), are those which have to be considered. The sections which are material on the present occasion are contained in the Act of 1883, and are ss. 47, registration; 50, copyright; 52 and 53, inspection and information; 55, register; 58, infringement; 60, definition; 90, rectification of register. Rules were made in 1890 and 1893 for carrying the Act into effect. These provide rules and forms for applications

C. A.
1896
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In re
CLARKE'S
DESIGN.
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(1) 10 Rep. Pat. Cas. 160.

(2) 28 Ch. D. 24.

C. A.

1896

*In re*CLARKE'S
DESIGN.

Lindley L.J.

for registration and a classification of goods. The important rules are 4, 5, 9, 12, and 15. The applicant for registration must state the nature of his design, and whether it is applicable for pattern or shape. (See rule 9 and Form E.) Ornament is not mentioned in the rule nor in the form, although it is alluded to in s. 60 of the Act. There is no provision for notice to the public of an application to register, and no opportunity is given for any opposition by the public to the registration. The comptroller, however, has considerable discretion in the matter (s. 47) and he can refuse the application; but in that case he must give notice to the applicant and hear what he has to say (s. 94 and rules 12 and 13), and the applicant can appeal from the comptroller's decision to the Board of Trade (s. 47, sub-s. 6 and rules 15-19). There is no appeal from the decision of the Board of Trade. Moreover, the register of a design is not open to public inspection until the copyright in it has expired. (See s. 52, modified by the Act of 1888, s. 6.) It is obvious that this procedure enables any one to register anything which he calls a design and which the comptroller may pass. It is also obvious that, however vigilant the comptroller may be, he is very likely to pass something which may in fact be neither new nor original, or something which may have been previously published in the United Kingdom. The only protection afforded to the public against an abuse of the Act and the acquisition of mischievous monopolies for designs which are neither new nor original, but which have escaped the vigilance of the comptroller and been improperly registered, is the protection of a Court when its aid is invoked by the registered owner of the design against an alleged infringer, or by a person aggrieved who applies (under s. 90 of the Act) to expunge a registered design from the register.

In this case the Court is applied to for an order to expunge a registered design from the register on the ground that it ought never to have been registered. The Court, therefore, has to ascertain, first, whether the so-called design is a design within the meaning of the Act of Parliament; and, secondly, to ascertain whether it was new or original when registered and had not been previously published in the United Kingdom.

The Act contains a section (s. 60) which says what a design means; but unfortunately the section says that a design means a design; the words are, “ ‘ design ’ means any design applicable to any article of manufacture . . . whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof.” The word “ design,” therefore, must be taken to be used in its ordinary signification of something marked out—a plan or representation of something. The subsequent words, however, shew that this Act does not extend to all designs, but only to such as are applicable to some article of manufacture. This is made still plainer by s. 58, which relates to infringement of the copyright conferred by the Act. This Act does not prohibit the multiplication of copies of drawings, engravings, photographs, or pictures. Copyright in them is governed by a different statute. This Act is confined to designs applicable to manufactured articles, and to the application of such designs to such articles. Again, the Act does not apply to the things to which a design is applied; the Act applies to the design applied to them. The distinction is obvious enough when the design is for a pattern or ornament; but when, as in this case, the design is for the shape of a thing, the distinction is reduced to the difference between the shape of a thing and a thing of that shape. A design applicable to a thing for its shape can only be applied to a thing by making it in that shape. A design for the shape of something is what is meant by s. 60 when shape is in question, and a registered design for a shape of a thing is infringed if that thing is made in the shape shewn by the registered design (see s. 58). This construction of the Act is illustrated by *Rogers v. Driver* (1)—the ventilating brick case—and by *Walker, Hunter & Co. v. Falkirk Iron Co.* (2) and *Hecla Foundry Co. v. Walker, Hunter & Co.* (3)—the moulded furnace-door case. The statute applies to all such designs as are within it, whether they add to the utility of the articles to which they are applied or whether they do not. The question of utility is wholly immaterial in considering this Act of Parliament. This is plain from its language, and was distinctly

C. A.
1896
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In re  
CLARKE'S  
DESIGN.  
———  
Lindley L.J.

(1) 16 Q. B. 102.

(2) 4 Rep. Pat. Cas. 390.

(3) 14 App. Cas. 550.



C. A.

1896

*In re*CLARKE'S  
DESIGN.

Lindley L.J.

pointed out in the two cases last referred to. The design registered in this case is a design for the shape of a lamp for electric lighting, and, so far as the word "design" is concerned, what is registered is within the meaning of that word as used in the Act of 1883.

I pass now to the shape for which the design is applicable, and to the inquiry whether at the date of its registration such shape was new or original and not previously published in the United Kingdom. It is not easy to determine what distinction, if any, is intended to be drawn between novelty and originality; but if there is any difference the design need not be both new and original. The Act applies to designs which are new or original provided they have not been previously published in the United Kingdom. In considering the novelty or originality of a design it must always be borne in mind that the applicability of the design to manufactured articles is the matter which has to be determined. This was pointed out in *Saunders v. Wiel* (1), the Abbey spoon-handle case. From the wording of ss. 47, 58, and 60, it might be thought that if a design had never been applied to articles comprised in one of the classes of goods into which manufactured articles are divided for the purposes of the Act, such design might be protected for that class even if it had been previously applied to goods of a different class. But it has been decided that if a design is really old in its application to some manufactured article its application to a new substance will not necessarily entitle it to protection, although such substance may not fall within the class to which the first article belongs. In *In re Bach's Design* (2), a lamp-shade in the shape of a rose, but made in linen, was registered for goods in class 12. It was held that a lamp-shade of the same shape, but made in china, and which had been registered for goods in class 14, was not entitled to protection, and it was removed from the register accordingly. Although the substances were dissimilar the shape was the same, and the articles having that shape were both lamp-shades—that is, they were both of the same kind and used for the same purpose. Again, in *In re Read and Greswell's Design* (3), a lamp-shade made of

(1) [1893] 1 Q. B. 470.

(2) 42 Ch. D. 661.

(3) 42 Ch. D. 260.

paper, shaped like a chrysanthemum, was registered in class 5, and a similar design for a lamp-shade of the same shape was expunged from the register, although it was registered for goods in class 12 and was made of linen and paper. In this last case Chitty J. (1) said that, "to be capable of being registered a design must be 'new or original' in fact, and not, as is suggested, 'new or original' as to some particular class of goods. It cannot be said to be new and original if it is already being applied to articles of an analogous character." The learned judge was obviously referring to the classes of goods mentioned in the schedule to the Designs Rules, and the words referring to articles of an analogous nature shew that the learned judge did not intend by the words "new or original in fact" to decide that a design must be new or original in the sense of never having been seen before as applied to any article whatever. In *Walker, Hunter & Co. v. Fatkirk Iron Co.* (2), and *Hecla Foundry Co. v. Walker, Hunter & Co.* (3), a design for the shape of an iron furnace-door was protected, although wooden doors of the same shape for sideboards and other articles of furniture were old. The things shaped were for such different purposes and their uses were so dissimilar that the design for one of such things was held to be new or original, although it was old for the other. What then is the test to be applied to a case such as that before us? The design must be new or original with reference to the kind of article for which it is registered, meaning by kind of article, not the class of article mentioned in the schedule to the rules, but the kind of article having regard to its general character and use. A design may be new for a coal-scuttle, but not for a bonnet. On the other hand, a design for a shade of a gas-lamp can hardly be new if it was old for an oil-lamp. In the present case the design registered is for the shape of an electric lamp, or, rather, of the shade for an electric light. It follows from what has been stated above that the shape may be new or original in its application to electric lamps, which are modern inventions, and yet be neither new nor original in its application to gas or oil lamps.

C. A.

1896

*In re*  
CLARKE'S  
DESIGN.

—  
Lindley L.J.  
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(1) 42 Ch. D. 262.

(2) 4 Rep. Pat. Cas. 390.

(3) 14 App. Cas. 550.

C. A.  
 1896  
 ~~~~~  
In re
 CLARKE'S
 DESIGN.
 ———
 Lindley L.J.

If when registered the design was not new or original for all lamps, if the shape was common for such lamps as were used before electric lighting was invented, the design is one to which the Act does not apply, and the design ought to be expunged. Electric lighting being new, every lamp or lamp-shade adapted to it for the first time may be said to be new or original if attention is paid only to its application to the new method of lighting. But it is absurd to suppose that the application of an old shaped lamp or shade to an electric light could be protected under this Act. There must be some novelty or originality in the shape as applied to sources of light in order that a design for the shape of a lamp can be protected. How, then, does this case stand? On the one side it is contended that there is nothing new or original in this design for the shape of lamps; on the other it is contended that this particular shape of lamp has never been seen before. The truth must be ascertained by looking at the shape of this particular design and by comparing it with the shapes of lamps or shades previously known. This method of determining such a question is not only dictated by good sense, but is warranted by decided cases: see *Hecla Foundry Co. v. Walker, Hunter & Co.* (1)

Applying this method to the present case, using my own eyes and attending to the evidence adduced on both sides, the conclusion at which I have arrived is that the design registered is nothing more nor less than an old and well known lamp or lamp-shade, with the omission of a part which was wanted for gas or oil burners, but which is useless for an electric light. The old shape of lamp or lamp-shade consisted, (1.) of a reflecting screen of the same shape as the reflecting screen in the registered design; (2.) of a ventilating top differing in no substantial particular from the ventilating top in the registered design; (3.) of a chimney on the ventilating top, and which chimney is omitted from the registered design, not being wanted. The omission of the chimney rendered it necessary to cover in the ventilating top; but that did not really alter the shape of the lamp or lamp-shade. Mr. Clarke has adapted a well known lamp or lamp-shade to electric lighting; but the

(1) 14 App. Cas. 550.

shape is the old shape, with the omission of a useless appendage. I have no doubt that a combination of old shapes may result in a new or original design for shape; and if that is the result, such design will be protected if registered under the Act. Nor do I say that even the omission of something from an old shape may not result in a new or original shape which may be protected. But when, as here, the old shape of an article well known in the United Kingdom consists of three parts placed one over the other, and the new shape is exactly like the old shape, except that the useless upper part is omitted, I cannot say that the shape of what is left is new or original, or that the residuary shape has not been previously published. Where a design is composed of old parts and is registered, the design as one whole is what is protected, not the design for some or one of the component parts taken separately from any of the others, and it is not necessary to distinguish what is old from what is new: *Holdsworth v. M'Crea*. (1) In this case, therefore, the design must be treated as a design for the shape of the screen or reflector and the ventilator above as one thing, and the design for the shape of either without the other is not what is registered. But, treating the design as a design for the shape of the two parts in combination, the view which I take of the evidence brings this case within the principle explained by this Court in *Le May v. Welch*. (2) There is nothing really new or original in the shape of the kind of article to which the registered design is made applicable. Sugg's affidavit, on which so much reliance was placed, only comes to this—that the design is new for electric lamps; but that alone is not sufficient, as already pointed out. Mr. Sugg himself admits that lamps like this, but with a chimney, were well known before. He, however, is of opinion that the omission of the chimney makes the rest of the design new. I cannot take this view; if it were correct, this design could be properly registered for old-fashioned lamps, which, in my opinion, it clearly could not. I have come to the conclusion that this design, being for shape, and shape only, though new in its application to electric lamps, was old in its application to other

(1) L. R. 2 H. L. 380.

(2) 28 Ch. D. 24, 35.

C. A.
1896
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*In re*  
CLARKE'S  
DESIGN.  
———  
Lindley L.J.  
———



C. A.  
1896  
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*In re*  
CLARKE'S  
DESIGN.

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lamps, and was not one to which the Act applied. The appeal must be allowed, with costs here and below, and an order must be made to remove the design from the register.

LOPES L.J. The applicant seeks to expunge from the Register of Designs a certain design registered by the respondent, J. F. Clarke. It was a design for the shape of an electric lamp or lamp-shade, and North J. refused the application

The question in controversy is whether this shape is new or original. The term "design" is defined in s. 60 of the Act to mean any design applicable to any article of manufacture. [His Lordship read the section.]

A design within the Act may be some ornament printed or produced on the flat, such as woven or printed designs in textile fabrics, paper-hangings, floor-cloths, or the like; or patterns or designs, etched or stamped, or cast or embossed, or cut or otherwise produced on metallic articles, or glass or plastic material, or furniture or tiles, or worked or woven as in lace; or it may be for artistic or beautiful shape or configuration, as in a lamp-stand or lamp-shade, or iron-railing or gate; or for shape in which no appeal is made to a sense of beauty, as in a new shape or configuration of a grate-door or oil-can or cravat; or the design may contain two or all of the foregoing elements—that is, ornament, pattern, shape, and configuration.

The section says nothing about utility—utility is immaterial. It is the design and the design alone that is protected. The Court must find the reasons for registration apparent to the eye. The design will not be the less protected if it is useful; but usefulness is not an element to be considered. It is essential, however, that the design should be new or original. The design at the date of application for registration must be "a new or original design not previously published in the United Kingdom." A new combination of two or more old patterns or designs may form good subject-matter for registration as a new or original design; but the combination must not be obvious, and must result in something new or original as a whole, whether it be an ornament, pattern, shape, or configuration.



Here it is sought to register the whole lamp or lamp-shade, all of which is admittedly old in shape, except the kind of boss at the top. It is not sought to register the application of the new shape of the boss to the old lamp or lamp-shade by itself: that would not answer the purpose of the respondent. Such registration has been offered to him, and he has refused it. What the respondent wants is a monopoly for the whole lamp or lamp-shade—a privilege to which he is not entitled.

The case of *Le May v. Welch* (1) is very like the present case. There the Court had to consider a registered design of a collar containing three characteristics which it was admitted had separately appeared in collars prior to the date of the plaintiff's registration. The combination was considered too narrow or trifling to constitute a new design. In the Court of Appeal Bowen L.J. said (2): "There must be not a mere novelty of outline, but a substantial novelty in the design, having regard to the nature of the article." "It is not every mere difference of cut, every change of outline, every change of length, or breadth, or configuration, in a simple and most familiar article of dress like this, which constitutes novelty of design."

Those words seem singularly applicable to this case. What is it the respondent seeks to register? It is a design which is simply the design of an old and well known lamp or lamp-shade, with the omission of a chimney, which was necessary where the lamp was used with gas or oil, but is not required where used with electric light, and a substitute of the boss for the chimney; but the shape of the apparatus is not materially altered. Put the two lamps or lamp-shades side by side, apply the test of the eye to them, and the only difference is the curtailment of the chimney in the respondent's lamp or lamp-shade, effecting no substantial change in the shape of the entire apparatus. You cannot, by adding that to or omitting that from the shape of a thing which is immaterial and does not substantially alter its shape, make that novel in shape which otherwise would not be novel. Here it is the old shape with the omission of an immaterial and useless part of it.

I cannot, therefore, hold that there is anything so new or

C. A.  
1896  
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*In re*  
CLARKE'S  
DESIGN.  
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Lopes L.J.  
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(1) 28 Ch. D. 24.

(2) 28 Ch. D. 34.



C. A.  
1896  
*In re*  
CLARKE'S  
DESIGN.

original in the respondent's lamp or lamp-shade as entitles him to protection. So to hold would be, using the words of Bowen L.J. in *Le May v. Welch* (1), "to paralyze industry and to make the Patents, Designs, and Trade Marks Act a trap to catch honest traders."

KAY L.J. This appeal asks the Court to expunge from the Register of Designs a certain design registered by the respondent, J. F. Clarke. It raises a very important question as to the meaning and effect of the Act of 1883.

The main objects of the statute are, first, to give five years' protection to a new or original design; and, secondly, to give information by the register what is the design so protected to any person who has obtained leave to inspect under s. 52.

Sect. 47 enables the comptroller to register "any new or original design"; s. 60 defines "design" to mean "any design applicable to any article of manufacture . . . whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof."

The respondent, Clarke, has registered a design applicable for the shape or configuration of an outside reflector for shop-windows and the like. A photograph of the reflector is registered. It consists of an ordinary form of reflector of the form which is familiar to Londoners, like the glasses used by gardeners to protect plants against cold, with one side open.

A number of flat, narrow glass sides are arranged in a perpendicular position round a circle, which is covered by a tent-shaped top. About a third of the side which is to be next to the window is left open without glass or anything. The inside is fitted with reflectors, which do not affect the outside shape. The glass of the side, where there is any, is made opaque. So far the design is old, and could not be registered. Various modes of using this reflector have been exhibited. When used for what is called an incandescent gas-lamp, the lamp is placed in the shape of a tall cylinder on the top of the reflector, the glass of the lamp protruding downwards within the reflector.

(1) 28 Ch. D. 34.

All the lamps shewn have some kind of cylinder erected on the top of the reflector.

Clarke has copied the shape of the old reflector exactly. He has put on the top of it a boss, shaped like a mushroom, with a thick stem about four inches high, which does not differ materially from the shape of the lower part of the old cylinder. This is the only novelty of shape which he has designed. But he has registered, not the boss, nor the application of the boss to the old shape of reflector, but he has registered the shape of the whole apparatus, including the old reflector, to which he has no right whatever. He has disclosed his object in doing this in an unmistakable way. He recently brought an action against the present applicants for an injunction to restrain them from making a reflector in the old well known shape, with a top utterly unlike the boss used by him. Of course he failed, and the action was dismissed. But the attempt shews that his intention is to obtain a monopoly if he can, not only for the boss, which is the only thing about his reflector which has any novelty, but for the old shape of reflector, to which he has no right in the world. His counsel were asked during the argument whether Clarke would be content with a registration of the boss as applied to the old shape of reflector. Of course, he answered "No."

Now, is this a proper registration of a new or original design within the meaning of the Act of Parliament? The respondent says it is, because his boss with the old reflector is a new combination, and that the shape of the whole apparatus is so modified by the addition that he has a right to register the whole as a new shape. It is easy to put cases which would reduce that argument to an absurdity. If a man invented an artistic knob to a tea-pot of well known shape, it would be impossible for him to maintain a right to register the shape of the whole tea-pot. Or, to take a nearer instance, if the shape of the stove, which was the subject of the litigation in *John Harper & Co. v. Wright and Butler* (1), had been altogether old, and the only novelty was the addition on the top of a vase or other ornamental design, I should think it a misuse of the Act to register

C. A.

1896

In re

CLARKE'S  
DESIGN.

Kay L.J.

(1) [1896] 1 Ch. 142.

C. A.  
 1896  
 ~~~~~  
In re
 CLARKE'S
 DESIGN.
 ~~~~~  
 Kay L.J.

the shape of the whole stove. It is argued that it must be in every case a question of degree; and I am inclined to agree thus far with that argument, that there may be cases in which the combination of two or more old designs might produce a design altogether novel; but, in my opinion, the test of degree is entirely against the respondent in this case. There is no more alteration of the shape of the old reflector by the addition of this boss than there is an alteration in the shape of a man when he puts on a hat.

Therefore, in my opinion, the respondent has not in this case complied with the first requisite of the Act by registering his invention or new design. He has purposely registered the main portion of the reflector, which was not his design. The only thing which he could have registered as his design, in my opinion, was the application of the new shape of his boss to the old reflector. This he admits would be of no use to him, and we are not asked to vary the register, which under s. 90 we might have power to do. On this ground alone I think this registration should be expunged.

In *Holdsworth v. M'Crea* (1) Lord Cranworth intimated an opinion that it was not intended in the case of a design "to require all the same nicety and accuracy which is required in the specification of a patent"; and Lord Westbury agreed in this, and it was held that when a design for a pattern was registered without any verbal description, such a registration was a claim to the whole design, and would not be infringed by taking part of it only. But in *M'Crea v. Holdsworth* (2) Lord Hatherley L.C. held that this decision did not mean that a colourable alteration would be permitted when the design was substantially copied; and that case was cited with approval in *Le May v. Welch* (3), in which Bowen L.J. said that not every change of outline constitutes novelty of design. "There must be," he says, "not a mere novelty of outline, but a substantial novelty in the design having regard to the nature of the article."

But when one considers what I have called the second object

(1) L. R. 2 H. L. 380.

(2) L. R. 6 Ch. 418.

(3) 28 Ch. D. 24.



of the registration, namely, to give information to the public, who by s. 88 have free liberty of inspecting the register subject to obtaining permission under s. 52, the irregularity of this registration seems to me more striking. How could any one discover from this registration that the only novelty of this reflector was the boss on the top of it? Who could know from the register that he was at liberty to copy the whole thing exactly except that boss? When a design is on the register not only may no one copy the whole of it, but no one could take the substantial portion of it with only a colourable alteration, without danger of being restrained by injunction. The substantial part of that which the respondent has registered is unquestionably the main body of the reflector. The effect, and I cannot help thinking the object, of this registration, was to obtain a monopoly not only in the boss as applied to the old reflector, but to get a monopoly in the reflector itself.

In my opinion, the registration is an abuse of the Act. If the comptroller had had before him the evidence which is now before this Court, he would probably have refused the application. I think it would have been his duty to do so. I think that this design, as entered, should be expunged.

Solicitors : *Walter B. Styer ; H. S. Sugden.*

H. C. J.

C. A.  
 1896  
*In re*  
 CLARKE'S  
 DESIGN.  
 Kay L.J.



C. A.

1895

STIRLING J.

*April* 2, 3, 4,

30;

*May* 1, 2, 3,

4, 7;

*Oct.* 29.

C. A.

1896

*Feb.* 20, 21,

22, 24, 25;

*March* 31.POWELL v. BIRMINGHAM VINEGAR BREWERY  
COMPANY.

[1894 P. 998.]

*Trade-mark—Trade Name—Name of Article—Non-descriptive Trade-mark—  
“Yorkshire Relish”—Rival Maker—Use of same Name for similar Article  
—Misleading Ordinary Buyer—Injunction.*

For thirty-five years the plaintiff had made, from a secret recipe, and sold in round glass bottles, a sauce which he called “Yorkshire Relish,” and those words were impressed into the glass of the bottles, and were printed, together with the plaintiff’s name, on the labels fastened to the bottles, and without the plaintiff’s name on the wrappers in which the bottles were sold. The plaintiff’s trade was very large and profitable; and some years ago he had registered the words “Yorkshire Relish” as an old trade-mark of his own; but, after litigation with the defendants, those words had been expunged from the register. The plaintiff had, however, hitherto succeeded in preventing any person other than himself from using the words “Yorkshire Relish” to denote a sauce. The defendants had not discovered the plaintiff’s secret, but they were making and selling, under the name of “Yorkshire Relish,” and in bottles similar to those of the plaintiff, a sauce very like the plaintiff’s sauce, and at a lower price. The defendants printed their own names on their own labels, and there were certain other differences in the labels and in the wrappers; but the evidence proved that the defendants’ sauce could be, and in some instances had been, mistaken by ordinary buyers for that made by the plaintiff:—

*Held*, by the Court of Appeal (Lindley, Kay, and A. L. Smith L.JJ.), affirming the decision of Stirling J., that the plaintiff was entitled to an injunction to restrain the defendants from selling their sauce as “Yorkshire Relish” without better distinguishing it from the sauce made and sold by the plaintiff.

The principle on which the Court acts in determining the rights of rival manufacturers with reference to the use of trade-marks and trade names stated and explained.

APPEAL by the defendants from a decision of Stirling J., restraining them from using the words “Yorkshire Relish” as applicable to sauces other than those of the plaintiff’s manufacture without clearly distinguishing the same from the sauce of the plaintiff.

The plaintiff carried on business as a drysalter and wholesale druggist at Leeds under the style of Goodall, Backhouse & Co.; and, for thirty-four years prior to 1894, he and his predecessors

in title had manufactured and sold under the name of "Yorkshire Relish" a sauce made according to a secret recipe. This sauce was sold in ordinary round glass bottles of three or four different sizes with the words "Yorkshire Relish" impressed into the glass of the bottles. On each of these bottles was a label having a red ground with two blue curved bands across it, bearing at the top the words "Yorkshire Relish," and at the bottom the words "Goodall, Backhouse & Co." printed in white in large letters. Between those words there was the device of a blue willow-pattern plate, and there were other words on the label in smaller type. These bottles were sold in wrappers of white paper, on the outside of which was printed in blue a willow-pattern plate, and underneath it in straight lines, "The Celebrated Yorkshire Relish," "Goodall, Backhouse & Co.," in large letters.

According to the evidence, the trade carried on by the plaintiff in "Yorkshire Relish" was a very large and profitable one, and he had spent during the thirty years prior to 1894 some 400,000*l.* in advertising the article; but whether alone or in conjunction with other articles of his manufacture it did not appear. It was stated about 6,000,000 bottles of the plaintiff's Yorkshire Relish were sold in the year 1893, and up to 1894 the plaintiff had succeeded in preventing any other persons from using the words "Yorkshire Relish" to denote a sauce.

On March 1, 1876, the plaintiff registered a trade-mark for sauces consisting of the device of a blue willow-pattern plate, and on the same day registered another trade-mark for sauces consisting of a label which comprised the words "The Celebrated Yorkshire Relish," and the same device of a blue willow-pattern plate. In both instances the user of the mark was claimed for twelve years before 1875.

In April, 1884, the plaintiff registered as a trade-mark, No. 37,030, the words, "Yorkshire Relish," claiming a user of eleven years before 1875.

In February, 1893, the defendants, the Birmingham Vinegar Brewery Company, who were the successors in business of Holbrook & Co., of London and Birmingham, moved before Chitty J. to rectify the Register of Trade Marks by expunging

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

C. A.  
 1896  
 POWELL  
 v.  
 BIRMINGHAM  
 VINEGAR  
 BREWERY  
 COMPANY.

therefrom the trade-mark No. 37,030 upon the ground that the words "Yorkshire Relish" had not been used separately as a trade-mark before 1875; and on this motion an order expunging this trade-mark was made by Chitty J. on February 15, 1893, which was affirmed by the Court of Appeal on April 27, 1893 (1), and by the House of Lords on November 20, 1893. (2)

After this decision, and a few months before the commencement of this action, the defendants, without having discovered the plaintiff's secret recipe, began to manufacture and sell under the name of "Yorkshire Relish" a sauce which, though not exactly the same as that of the plaintiff, was very much like it, and was cheaper. According to the evidence, the plaintiff's bottles were sold to the trade at 4s. 3d. per dozen (being 4s. 6d. per dozen, less 5 per cent. discount) and were retailed by the trade at 4½d. per bottle; while the defendants' sauce was sold by them to the retailers at 3s. per dozen, and retailed to customers at the same price as the plaintiff's, namely, 4½d. per bottle. The defendants' sauce was put up in bottles of the same shape and size as those used by the plaintiff, bearing a white label with the words "Yorkshire Relish" in a curve like the plaintiff's, but in gilt letters, under which in small letters was "manufactured by"; then a gold disc the same size as the plate on the plaintiff's label, bearing the device of St. George and the Dragon, and underneath the words "Holbrook & Co." in white letters on a gilt band, which was straight and not curved like that of the plaintiff. At the top, on a separate label, were the words "Best Quality." These bottles were wrapped sometimes in white, and sometimes in pink paper wrappers, outside which were pasted the same labels that were put upon their bottles.

This action was commenced by the plaintiff in 1894 for an injunction to restrain the defendants from passing off, or attempting to pass off, and from enabling others to pass off sauce not of the plaintiff's manufacture as or for the goods of the plaintiff by the use of the words "Yorkshire Relish," or in any other way; and also for an order for delivery up of all

(1) See *In re Powell's Trade-mark*, [1893] 2 Ch. 388.

(2) See [1894] A. C. 8.

sauce labels in the possession or under the control of the defendants bearing the term "Yorkshire Relish," and not being labels emanating from the plaintiff, and for other relief.

On July 24, 1894, Stirling J., upon motion on behalf of the plaintiff, granted an interlocutory injunction restraining the defendants from using the words "Yorkshire Relish" as descriptive of or in connection with their sauce without clearly distinguishing it from the plaintiff's.

The defendants appealed, adducing fresh evidence for the purpose of shewing that the two sauces were identical; but the appeal was dismissed on August 8, 1894. (1)

The defendants then discontinued using their original wrapper and label, and commenced selling "Yorkshire Relish" in bottles covered with a pink wrapper, retaining the label with "Best Quality" on it, but removing the disc from the middle to the top, placing "Holbrook's" in a line by itself in large capitals, then the words "Yorkshire Relish" in smaller capitals, followed by the words "Manufactured by the Birmingham Vinegar Brewery Company, Limited, successors to Holbrook & Co., London and Birmingham."

The action came on for trial before Stirling J. on April 2, 1895, and numerous witnesses gave evidence in support of the cases made by the plaintiff and defendants respectively. For the plaintiff, numerous wholesale and retail grocers, export agents, travellers, sauce makers, and purchasers and scientific witnesses were called, and the effect of the evidence, stated shortly, was that if a purchaser asked for Yorkshire Relish he would expect to get the plaintiff's sauce; that the plaintiff's sauce differed in certain particulars from that made by the defendants, and that the defendants' sauce was sometimes passed off as the plaintiff's, and customers were deceived thereby. On behalf of the defendants, numerous similar witnesses were called to contradict this evidence; and the result will be found in the judgments delivered.

*Hastings, Q.C., Sir R. E. Webster, Q.C., John Cutler, and Hampson*, for the plaintiff. The term "Yorkshire Relish" has

(1) *Powell v. Birmingham Vinegar Brewery Company*, [1894] 3 Ch. 449.

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.



C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

for thirty-four years been known to the trade and the public as denoting the sauce manufactured and sold by the plaintiff, and no other sauce, and persons asking for Yorkshire Relish expect to get, and intend to purchase, the plaintiff's sauce, and no other sauce. Dealers quote "Yorkshire Relish" in their price-lists without any additional description; and customers ordering from those lists expect to be, and are in fact, supplied with the plaintiff's sauce. The defendants are passing off, and enabling others to pass off, their sauce, which is not made according to the plaintiff's recipe, as and for that of the plaintiff. The plaintiff's sauce has come to be known as "Yorkshire Relish," and the defendants are not entitled to use that name without doing all that is possible to prevent deception: *Singer Manufacturing Co. v. Loog*. (1)

*Moulton, Q.C., Buckley, Q.C., and Vernon Smith*, for the defendants. "Yorkshire Relish" is the name of a well known kind of sauce, and everybody has a right to that name. The defendants clearly state upon their bottles that they are the makers. There is, therefore, no attempt to pass off their goods as those of the plaintiff. The question of the identity of the sauce is immaterial, because no two makers of the same kind of sauce ever work by the same recipe. There are, for instance, several makers of Worcester sauce, but of course there are differences in the manufactured article. On the evidence, however, we submit that the defendants' sauce is practically the same as the plaintiff's; taken with food, they are indistinguishable; and there is no fraud upon the public committed by the defendants. The plaintiff has no monopoly in the name, and if his recipe were not a secret any one could make the sauce and sell it as "Yorkshire Relish." The defendants make a sauce which is practically the same, and have a right to take advantage of the popularity of the name. In describing our sauce as "Holbrook's Yorkshire Relish" we are saying nothing but the truth, and are not infringing any right of the plaintiff.

In *Siebert v. Findlater* (2) it was held that the defendant had been guilty of an attempt to deceive: it was a clear case of fraud; and the judge came to the conclusion that the defendant

(1) 8 App. Cas. 15.

(2) 7 Ch. D. 1801.



intended to induce people to believe that the goods sold by him were the goods of the plaintiff. Here the defendants endeavour to shew as clearly as possible that their sauce is a rival article.

Again, in *Linoleum Manufacturing Co. v. Nairn* (1), it was held that there was no infringement of trade-mark, and no attempt to pass off the defendants' goods for those of the plaintiff, it being clearly considered by the Court that those were the only grounds upon which the plaintiff could claim relief.

In *Reddaway v. Banham* (2) it was held that a manufacturer was entitled to call his goods by a name which was a substantially correct description of them, notwithstanding that people might be misled thereby; and Rigby L.J. in that case referred to *Young v. Macrae* (3) and *Cheavin v. Walker* (4), and said that the principle running through all the cases was that whatever was mere description was open to all the world. So here the defendants are at liberty to describe their sauce by the name by which it is known to the public. What is the equity which the plaintiff is seeking to enforce? On general principles every person should be at liberty to use his own skill and knowledge. A monopoly is offensive to the law, and patents are only allowed on the defined stringent condition that the patentee discloses his invention, so that when the patent expires everybody can make the article. The plaintiff makes his sauce according to a secret recipe; but his only right or equity is to restrain other people from passing off their goods as his. The money he has spent in advertising does not give him any vested rights or confer upon him any monopoly. He has no exclusive right to the use of the words "Yorkshire Relish": *In re Powell's Trade-mark* (5); *Reddaway v. Banham*. (6) The defendants are perfectly entitled to avail themselves of the demand that the plaintiff has created for a commercial article called "Yorkshire Relish," to go into the trade, and, by finding out the plaintiff's secret or otherwise, to make if they can the identical article, as we say they have done,

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

(1) 7 Ch. D. 834.

(2) [1895] 1 Q. B. 286.

(3) 9 Jur. (N.S.) 322.

(4) 5 Ch. D. 850.

(5) [1893] 2 Ch. 401, 407.

(6) [1895] 1 Q. B. 297.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

and to sell it as "Yorkshire Relish," so long as they do not attempt to pass it off as the goods of the plaintiff, which we say they never have done. "Yorkshire Relish" is no longer a fancy name: it means a particular thing, like Bungalow, Brougham, or Chlorodyne: *Browne v. Freeman* (1); *In re Palmer's Trade-mark* ("Braided Fixed Stars") (2); *Linoleum Manufacturing Co. v. Nairn*. (3) And on the evidence it does not mean an article made by any particular maker. "Goodall's Relish" would mean nothing. The plaintiff wants to appropriate and protect the words "Yorkshire Relish," which he has no right to do; his only right is to restrain the defendants from passing off their goods as his, and he has entirely failed to establish any such case.

*Hastings, Q.C.*, in reply, referred to *Ford v. Foster* (4); *Montgomery v. Thompson*. (5)

*Cur. adv. vult.*

1895. Oct. 29. STIRLING J., after stating the facts:—My decision on the motion was based on the following grounds: first, that the term "Yorkshire Relish" was not a descriptive but a fancy name; secondly, that this name—though not one to which the plaintiff had an exclusive title—did, nevertheless, in point of fact, denote in the market the plaintiff's manufacture; and, thirdly, that the defendants had not taken sufficient precautions to prevent purchasers from being misled into buying the defendants' sauce when they meant to buy the plaintiff's. Each of these points must now be reconsidered with reference to the evidence adduced at the trial.

As regards the law bearing on the case, the leading authorities were referred to and dealt with by me in my former judgment, and I do not propose to add anything on that head, except that I must take notice of a decision of the Court of Appeal which has been given since the motion was heard.

The first point, then, is, Do the words "Yorkshire Relish" constitute a descriptive or a fancy name? The law on this subject has, in the present year, been considered by the Court

(1) 12 W. R. 305.

(3) 7 Ch. D. 834.

(2) 24 Ch. D. 504.

(4) L. R. 7 Ch. 611.

(5) [1891] A. C. 217.

of Appeal in the case to which I have just referred of *Reddaway v. Banham*. (1) [His Lordship referred to the judgments in that case (which has since been reversed by the House of Lords (2) ), and continued :—]

In the first place, then, is the term “Yorkshire Relish” descriptive? I think it is not. The words do not seem to me to be in any sense a description of the article made by the plaintiff. The name is merely a fancy name, just as much as if the article had, to use the illustration of the Master of the Rolls, been called “Primrose Sauce.”

But there is another point of view with regard to which the case of *Reddaway v. Banham* (1) has a bearing, and to deal with that I must state some further facts. In paragraph 8 of the statement of claim the plaintiff raises this issue: “The defendants’ said sauce differs in composition from Goodall, Backhouse & Co.’s said sauce.” To this, in their defence, the defendants reply: “The defendants do not admit (though this is immaterial for the purpose of this action) that their sauce differs in composition from Goodall, Backhouse & Co.’s sauce.” If the defendants, when they say that difference of composition is immaterial for the purpose of this action, mean that, even if the composition of the two sauces were the same, the rights of the plaintiff and the duties of the defendants would not be affected, I think that there is much to be said in favour of this view; but it is sufficient for me to say that the defendants have accepted the plaintiff’s challenge, and that the state of the evidence, in my judgment, renders it unnecessary to express a concluded opinion upon it. In addition to other witnesses, three expert analytical chemists were called by the plaintiff, and the same number by the defendants. Each of these gentlemen has made a chemical analysis of the sauces, and ascertained, as far as may be, the chemical ingredients which enter into their composition. On this part of the case there is no great conflict between the witnesses. The result is that there are certain differences in the chemical composition of the two sauces, the most conspicuous being that the plaintiff’s sauce contains a much greater quantity of sodium chloride (that is, common

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Stirling J.

(1) [1895] 1 Q. B. 286.

(2) [1896] A. C. 199.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Stirling J.

table salt) than the defendants'. [His Lordship then referred to the evidence of the defendants' witnesses on this point, and continued :—]

Now, if the issue tendered by the plaintiff had to be decided on the evidence of these three witnesses alone, without taking into consideration what was said by the not less eminent experts called on behalf of the plaintiff, I should be of opinion that the true inference was that the composition of the two sauces was not the same, but that they closely resembled one another in taste. Taking that as the true conclusion of fact, let me apply the test whether the case falls within the exception laid down by the Master of the Rolls in the judgment which I have just read, namely, "that a man cannot be restrained by injunction from telling in the course of business that which is the simple truth"; or, as he says in another place, "from telling that which is neither more nor less than the exact truth." By sending their sauce into the market under the name of "Yorkshire Relish" the defendants, in my opinion, represent to the public that it is the same article as that hitherto procured under that name. On the evidence to which I have just referred, is this the simple truth? My answer is, "No; the assertion goes beyond the simple truth." On the evidence to which I have referred, it might be right to describe the defendants' sauce as a "wonderful match" to "Yorkshire Relish," but not simply as "Yorkshire Relish." In my judgment, therefore, the case of *Reddaway v. Banham* (1) does not assist the defendants.

The second question is whether the name "Yorkshire Relish" does or does not, as used in the market, denote the plaintiff's manufacture. Now, on the facts as to the use of the words "Yorkshire Relish" in the market, there is really no conflict of evidence. [His Lordship referred to the evidence, and continued :—]

In that state of things, I think that purchasers who were in the habit of using "Yorkshire Relish," and who knew the plaintiff was the manufacturer, would, on asking for "Yorkshire Relish," expect to get the plaintiff's sauce; and those who did

(1) [1895] 1 Q. B. 286.



not know who the manufacturer was would expect, on asking for "Yorkshire Relish" simply, to get the same article as they had been in the habit of buying, namely, the plaintiff's. Under these circumstances, when the defendants introduced their goods on the market under the name of "Yorkshire Relish" they were bound, in my opinion, to take precautions to prevent purchasers from being misled into buying the defendants' sauce when they meant to buy the plaintiff's.

I have referred, in my former judgment, to the authorities on this point; and on this occasion I will content myself with quoting a few words from the judgment of Bowen L.J. in the Court of Appeal in the course of the former litigation between the same parties. He says (1): "In this particular case it is perfectly true that 'Yorkshire Relish' denotes the article which is made by, and has been made for many years by, the appellant's firm, and it looks extremely unlikely that any person, even the respondents" (that is, the present defendants), "could now use the term 'Yorkshire Relish' without running great risks." The evidence in the present case appears to me to bear out that conclusion of fact. "But," the Lord Justice goes on to say, "if 'Yorkshire Relish' is not a term to which the appellant has the exclusive right, it is conceivable that the respondents or any other persons in the trade might by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they are selling from the sales of the appellant's sauce, or so distinguish the manufacture of the article which they manufacture from the manufacture of the appellant's sauce, as to prevent the possibility of the outside customer being deceived. It is impossible for a Court of Law to say that it might not be done, and if it can be done, the trade have a right to have that door left open to them." The Lord Justice appears to me plainly there to lay down that, upon any person taking advantage of the removal of the words "Yorkshire Relish" from the register, and introducing goods under that name into the market, he is bound so to distinguish the article which he so introduces as to prevent the possibility of the outside customer being deceived.

(1) [1893] 2 Ch. 407.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Stirling J.

C. A. I then come to the third question. Are the precautions taken by the defendants sufficient to exclude this?

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

Stirling J.

Now, although it has several times been laid down that it is the duty of the person who thus introduces articles of his manufacture into the market under the same name as that employed by another manufacturer to distinguish the goods so newly introduced from those previously in the market, no Court has ever said how the distinction is to be made; and, in my judgment, this is not a matter which can be reduced to any simple rule, but must depend on the circumstances of each particular case. It may very well be that what is sufficient in the case of a wine producer may not be enough in the case of a brewer, and that that which is perfectly adequate in the case of a brewer may prove to be quite inadequate in the case of a maker of pickles and sauces. The one point to be considered in each case appears to me to be whether the natural and probable result of the defendants' acts will be to mislead purchasers, and so deprive the plaintiff of business intended for him. [His Lordship then considered the evidence upon this point, and continued :—]

In my judgment, therefore, the plaintiff has made out a case which entitles him to a perpetual injunction in the same form as that granted on the motion. If the plaintiff desires an inquiry as to damages, I think he is entitled to it; but he will take it at his own risk, and in the form of "what damages, if any." The costs of the action, of course, must be paid by the defendants.

The plaintiff took an inquiry as to profits, not as to damages.

G. A. S.

C. A. The defendants appealed. The appeal came on for hearing on February 20, 1896.

*Moulton, Q.C., Buckley, Q.C., and Waggett*, for the appellants. The plaintiff wants a monopoly of the words "Yorkshire Relish" as a fancy name identified with goods of his make; but the words "Yorkshire Relish" are simply and solely the name of a sauce of a distinctive flavour; there is no other

name for it, and in the absence of fraud any one may sell an article of a particular name under that name even if the public are misled by it: *Reddaway v. Banham*. (1) In the same way any trader may use his own name: *Turton v. Turton* (2); *Burgess v. Burgess*. (3) So in *Linoleum Manufacturing Co. v. Nairn* (4) it was held that any one might use the word "Linoleum" in reference to the patented article after the expiration of the patent. Here the plaintiff is in effect claiming a perpetual patent. In *Wotherspoon v. Currie* (5), the "Glenfield Starch" case, the name "Glenfield Starch" was not the name of the article. Starch was the article, and the name "Glenfield" merely shewed the origin of the article. So in *Montgomery v. Thompson* (6), the "Stone Ale" case. But here the article is "Yorkshire Relish," and it would not be adequately described as Birmingham Relish or Holbrook's Relish. It has been held that the plaintiff is not entitled to the use of the words "Yorkshire Relish" as a trade-mark, and that the defendants were persons aggrieved because the existence of the trade-mark prevented them from using those words in the event of their wishing to manufacture this particular sauce: *In re Powell's Trade-mark*. (7) The effect of that decision is to leave it open to the defendants to use these words in some way, provided that they do not pass off their goods as the goods of the plaintiff. In *Reddaway v. Bentham Hemp Spinning Co.* (8) the question was as to the right of the plaintiffs to the exclusive use of the words "Camel-hair Belting," and Lindley L.J. thus laid down the law: "If it denotes belting made only by the plaintiffs, the defendants have no right to sell their belting by the same name unless they take sufficient precaution to prevent buyers from being misled. But if the expression 'Camel-hair Belting' denotes a particular kind of belting which any one may make, then any one who makes that kind of belting may call it by the name by which it is known in the trade"; and in *Reddaway v. Banham* (1) it was held that the words "Camel-hair Belting"

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

(1) [1895] 1 Q. B. 286.

(2) 42 Ch. D. 128.

(3) 3 D. M. & G. 896.

(4) 7 Ch. D. 834.

(5) L. R. 5 H. L. 508.

(6) [1891] A. C. 217.

(7) [1893] 2 Ch. 388; [1894] A. C. 8.

(8) [1892] 2 Q. B. 639, 643.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

---

were a substantially correct description of a particular kind of belting, and that the defendant could not be restrained from the use of the term even though it might lead to deception. So here it is sufficient to say that the two articles, as commercial articles, are the same for all practical purposes. It may be that *Reddaway v. Banham* (1) will be reversed by the House of Lords (2); but it is distinguishable because camel hair was only one of the ingredients of the belting which was described by other manufacturers by various names; but here there is no other mode of describing the sauce known as "Yorkshire Relish." The only right of a trader is to prevent other people selling their goods as his; but here the defendants intend to sell "Holbrook's Yorkshire Relish"; they want to be the plaintiff's competitors, but they do not want to be thought to be Goodall, Backhouse & Co. It is a perfectly open attempt to get a share of the trade in "Yorkshire Relish." No protection is afforded against any person selling "Yorkshire Relish" under circumstances which render it impossible to suppose it was the plaintiff's. There is no monopoly either in the article or in the name. Further, the identity of the article is foreign to the question whether what the defendants are doing is representing their goods as the plaintiff's, which is the real question in this case. If the defendants distinguish their sauce as their make, they have done all that they are bound to do. The words "Yorkshire Relish" are now *publici juris*, and the plaintiff has no right of property whatever in those words.

*Hastings, Q.C.*, and *John Cutler*, for the respondent. The manner in which the appellants have put their goods on the market, the selection of our name, "Yorkshire Relish," for their own sauce, and the general get-up and character of their bottles, labels, and wrappers, shop-cards and price-lists, are very strong evidence of a fraudulent intent on their part to pass off, or enable them to pass off, their goods for those of the respondent, so as to deceive the public: *Wotherspoon v. Currie*. (3) And the evidence establishes that the public have been deceived, and also the fact that the two sauces are not

(1) [1895] 1 Q. B. 286.

(2) [1896] A. C. 199.

(3) L. R. 5 H. L. 508.



the same; though, even if they were identical, that would not entitle the appellants to pass off their sauce as ours. The appellants cited *Reddaway v. Banham* (1) as an authority in their favour; but the decision in that case only applies to a descriptive name, and the same remark applies to *Cheavin v. Walker* (2), where the name "Rapid Water Filters" was also a descriptive name. "Yorkshire Relish" is a non-descriptive name, and if the appellants cannot use it without deceiving the public, they must drop it entirely: *Montgomery v. Thompson* (3); *Ford v. Foster* (4); *Grezier v. Autran*. (5)

In other respects their arguments were similar to those already reported.

*Buckley, Q.C.*, in reply.

*Cur. adv. vult.*

March 31. LINDLEY L.J. The plaintiff in this case does not complain of the infringement of any registered trade-mark. He relies exclusively on his common law right to prevent other people from making and selling goods which can be and are passed off and mistaken for goods made by him under the name "Yorkshire Relish." The case is one of very great importance, not only to the parties concerned, but to traders and the public generally. I will first state what I conceive to be the law applicable to such cases generally, and I will then consider the facts of this case in particular.

Before there was any legislation on the subject of trade-marks it was well settled that when any one adopted a mark so closely resembling the trade-mark of the plaintiff as to be likely to be mistaken for it, the plaintiff was entitled to an injunction to restrain the use of such mark. Fraud on the public to the detriment of the plaintiff was the foundation of the right to damages at common law: per Lord Blackburn in *Singer Manufacturing Co. v. Loog* (6); but as long ago as 1833 it was decided in *Millington v. Fox* (7) that intentional deceit was not essential to warrant the Court in granting an injunction. The

(1) [1895] 1 Q. B. 286.

(2) 5 Ch. D. 850.

(3) [1891] A. C. 217.

(4) L. R. 7 Ch. 611.

(5) 13 Rep. Pat. Cas. 1.

(6) 8 App. Cas. 29.

(7) 3 My. & Cr. 338.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

Court will interfere to protect a plaintiff if ordinary or unwary purchasers are likely to be misled and to mistake the defendant's goods for the plaintiff's. Nothing can be more emphatic on this point than Lord Cairns's judgment in *Singer Manufacturing Co. v. Wilson*. (1) [His Lordship read the passage referred to, and continued:—]

In cases of this description the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against. This point was settled as long ago as 1824 in *Sykes v. Sykes* (2), and has been recognised ever since. See, inter alia, in the *Singer Manufacturing Co. v. Loog* (3), by Lord Selborne, when commenting on the brass plate at one time used by the defendant in that case. Persons may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known but whose mark is imitated is just as much injured in his trade as if his name were known as well as his mark. His mark as used by him has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods. A rival who imitates his mark can hardly help deceiving buyers and injuring him; and for such injury, if proved, he can obtain redress. *Seigert v. Findlater* (4) (the "Angostura Bitters" case) illustrates this. (5) But it must never be forgotten that a trade-mark only confers on the person whose mark it is a right to say, "Do not imitate my mark in connection with goods like mine so that yours may be mistaken for mine." There is no exclusive right to the mark except in connection with such goods and to prevent deception or mistake. Still less does a trade-mark confer any exclusive right to make or sell the kind of goods denoted by the mark. Unless a person has a patent for his goods, similar goods may be made and sold by any one; and they may be better or worse, dearer or cheaper, than those denoted by the mark. The mark is only a protection against mistakes in taking one person's

(1) 3 App. Cas. 391, 392.

(3) 8 App. Cas. 18.

(2) 3 B. & C. 541.

(4) 7 Ch. D. 801.

(5) 7 Ch. D. 807.

goods for another's, and the right conferred by a trade-mark is only to prevent its use if its use deceives or misleads, or is proved to be calculated so to do. The sense in which, and in which alone, a person entitled to a trade-mark has a property in it was fully explained in *Singer Manufacturing Co. v. Loog* (1) by Lord Selborne (2), by Lord Blackburn (3), and by Lord Watson. (4) [His Lordship read the passages above referred to, and continued]:—

Precisely the same principles are applicable to the use of words as to the use of marks for the designation of particular goods. This is shewn by such cases as the *Angostura Bitters Case* (5); the *Glenfield Starch Case* (6); the *Stone Ale Case* (7); *Braham v. Bustard* (8) (the “Excelsior White Soft Soap” case); and *Seixo v. Provezende*. (9) But the exclusive right to the use of words is much more burdensome to other people than the exclusive right to the use of a mark. A person who designs or adopts a mark to denote his goods imposes no unreasonable burden on rivals in trade by forbidding them from using the same mark to denote similar goods if the public are thereby misled. But to monopolise the use of words imposes a much more serious burden. Consequently, limits have been put to the right to complain of the use of words which have not been put to the right to complain of the use of marks. For example, if a man uses his own name to denote his own goods, it would be intolerable to confer upon him the right to prevent other people of the same name from honestly using their own name to denote their own goods, even although they might be of the same kind as his, and be undistinguishable from them: *Burgess v. Burgess* (10); *Turton v. Turton*. (11) Again, if a person uses words which simply describe the kind of goods he makes or sells—e.g., leather boots—it would be intolerable to confer upon him the right to prevent other persons from honestly using the same words to describe what they make or sell. Although,

C. A.  
1896  
POWELL  
&  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

(1) 8 App. Cas. 15.

(2) Ibid. 27.

(3) Ibid. 32, 33, 37.

(4) Ibid. 38, 39.

(5) 7 Ch. D. 801.

(6) L. R. 5 H. L. 508.

(7) 41 Ch. D. 35; [1891] A. C. 217.

(8) 1 H. &amp; M. 447.

(9) L. R. 1 Ch. 192.

(10) 3 D. M. &amp; G. 896.

(11) 42 Ch. D. 128.

C. A.  
 1896  
 POWELL  
 v.  
 BIRMINGHAM  
 VINEGAR  
 BREWERY  
 COMPANY.  
 Lindley L.J.

however, a person by using his own name, or a merely descriptive word, to denote a particular article, cannot prevent other bonâ fide traders of the same name from using it, or prevent other bonâ fide traders making or selling the same sort of goods from using the same descriptive word, yet, even in such a case, if the descriptive name is proved to mean the goods of the plaintiff, and if deception is also proved, a person may be restrained from using such name or word without taking such steps as will render mistakes unlikely to occur. The following are well known instances: *Holloway v. Holloway* (1); *Seixo v. Provezende* (2); *Wotherspoon v. Currie* (3) ("Glenfield Starch"); *Seigert v. Findlater* (4) ("Angostura Bitters"); *Thompson v. Montgomery* (5) ("Stone Ale").

The leading case on this point is *Reddaway v. Banham* (6), decided the other day in the House of Lords. (7) In that case the plaintiffs had long made and sold camel-hair belting; the defendants also made and sold camel-hair belting. Both beltings were really made of camel's hair. But it was proved that in the trade camel-hair belting meant camel-hair belting of the plaintiffs' manufacture, and that the defendants' goods were, in fact, sold for the plaintiffs'. The Court of Appeal held that the plaintiff was not entitled to an injunction (6); but the House of Lords took a different view. Lord Herschell said (p. 210): "The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the

(1) 13 Beav. 209.

(2) L. R. 1 Ch. 192.

(3) L. R. 5 H. L. 508.

(4) 7 Ch. D. 801.

(5) 41 Ch. D. 35; [1891] A. C. 217.

(6) [1895] 1 Q. B. 286.

(7) [1896] A. C. 199.



defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this I think he would, on well-established principles, be entitled to an injunction. In my opinion, the doctrine on which the judgment of the Court of Appeal was based, that where a manufacturer has used as his trade-mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark, is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival." And again, Lord Herschell said (p. 214): "What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade-mark? I answer he has no such right; but he has a right to insist that it shall not be used without explanation or qualification if such a use would be an instrument of fraud." Lord Macnaghten said (p. 218): "The appellants concede—they cannot indeed any longer dispute—that everybody who makes belting of camel hair is entitled to describe his belting as camel-hair belting, provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under colour of imparting accurate and possibly interesting information. Practically the only difference which the unexpected turn in the evidence has made is this: the case now comes more properly under the second branch of the proposition laid down by James L.J." (in a passage cited from *Singer Manufacturing Co. v. Loog* (1)) "if camel-hair belting had kept its place as a fanciful term it would have fallen under the first. The learned counsel for the respondents maintained that the expression 'camel-hair belting' used by Banham was the 'simple truth.' Their proposition was that 'where a man is simply telling the truth as to the way in which his goods are made, or as to

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

Lindley L.J.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

the materials of which they are composed, he cannot be held liable for mistakes which the public may make.' That seems to me to be rather begging the question. Can it be said that the description 'camel-hair belting' as used by Banham is the simple truth? I will not call it an abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; is not sterling coin; it has no right to the genuine stamp and impress of truth."

Again, if a person makes or sells an article and calls it by a particular name, the use of that particular name by others for the same sort of goods is not necessarily an infringement of his rights, even if the name is not obviously descriptive. If the article is a patented article, sold by the patentee under the name in question, then when the patent expires any one is at liberty to make and sell the article, and to sell it under the name by which it has become known in the market; and if nothing more is done, the patentee has no redress. This was decided in *Cheavin v. Walker* (1), and *Linoleum Manufacturing Co. v. Nairn*. (2) Again, if a person makes an article not patented, and gives it a certain name by which the article comes to be known in the market, any one who can make the same kind of article can call it by the name by which it is known, if he can in fact do so without passing off his goods for those of the original makers: see *Seigert v. Findlater* (3) (the "Angostura Bitters" case), and *In re Leonard and Ellis's Trade-mark* (4) (the "Valvoline" case).

But no case has yet decided that the name of an article,

(1) 5 Ch. D. 850.

(2) 7 Ch. D. 834.

(3) 7 Ch. D. 801.

(4) 26 Ch. D. 288.

whether patented or unpatented, can be used in such a way as to pass off one person's goods for those made by another. In *Cheavin v. Walker* (1), in the *Linoleum Case* (2), and in the *Valvoline Case* (3) there was no deception, and no injunction was granted. In the *Angostura Bitters Case* (4) there was deception, and an injunction was granted; and although there the defendants' bitters differed from the plaintiffs', this only made the deception easier of proof. *Braham v. Bustard* (5) (the "Excelsior White Soft Soap" case) is another illustration of the same principle. So is the *Camel-hair Belting Case* (6), already referred to.

There is another way in which a name originally a good trade name may lose its character and become *publici juris*—i.e., where the first person using the name does not claim the right to prevent others from using it, and allows other persons to use it without complaint. The name then comes to denote the article and nothing more; the name becomes *publici juris*, and any one who is at liberty to make the article can call it by the name by which it is usually known. *Ford v. Foster* (7) is the leading authority on this head. No name, however, can become *publici juris* in this way so long as the person originally entitled to the use of the name asserts his rights in that respect. Moreover, it is for those who assert that a trade name has become *publici juris* to prove it (per Lord Cairns—the *Singer Machine Manufacturers v. Wilson*. (8))

A more difficult case arises where a man has long been the sole maker of a particular kind of article which he has always called by some name by which his goods are known—by which, in fact, they are usually called by ordinary buyers. A rival trader cannot, of course, adopt the trade name and make up his own articles so as to make them look like or pass for the other's. But if he can avoid doing this, there is no law to prevent him from making and selling goods of the same sort as the other's, nor from calling them by the name by which alone they are known in the market.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

(1) 5 Ch. D. 850.

(2) 7 Ch. D. 834.

(3) 26 Ch. D. 288.

(4) 7 Ch. D. 801.

(5) 1 H. & M. 447.

(6) [1896] A. C. 199.

(7) L. R. 7 Ch. 611.

(8) 3 App. Cas. at pp. 384, 385.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

If it be impossible profitably to use the old name, and at the same time so to distinguish the two classes of goods as to prevent the rival goods from being mistaken for others, what is to be done? Is the name to be protected and rivalry prevented, or is the rival to be at liberty to use the name and destroy the trade of the old trader? Both principle and authority clearly appear to be in favour of the old trader if he can prove that the name denotes his goods and that his rival's are in fact mistaken for his. The *Excelsior White Soft Soap Case* (1) and the *Angostura Bitters Case* (2) go far to shew this. In the *Stone Ale Case* (3) the difficulty to which I am alluding was commented on by several of the Lords. It was there decided that a brewer at Stone, who had long called his ale "Stone Ale," was entitled to protection against a rival, who also brewed ale at Stone, and called it "Stone Ale." [His Lordship then read passages from the judgments delivered in that case by Lord Herschell and Lord Watson. (4)]

Whatever doubt there might have been on this matter is now removed by the decision of the House of Lords in *Reddaway v. Banham* (5), to which I have already referred, for it was admitted there that camel-hair belting truly described the article so called. This decision settles the question I am considering in favour of the old trader, if he can succeed in proving his case, which, however, may often be very difficult for him to do. This doctrine, however, is said to lead to this curious result—namely, that an inventor of an unpatented article, to which he gives a name, may be able practically to enjoy a longer monopoly in the name than an inventor of a patented article. But there is nothing anomalous in this. If a man has a secret invention by which he can make an article better or cheaper than other people, he practically has a monopoly in that article until his secret is discovered, or some one else can make a better or cheaper article. There is no limit to the duration of this monopoly. As regards name, when his secret is discovered he is in the same position as a patentee whose patent has expired.

(1) 1 H. & M. 447.

(2) 7 Ch. D. 801.

(3) 41 Ch. D. 35; [1891] A. C. 217.

(4) See *Montgomery v. Thompson*,  
[1891] A. C. 220, 222.

(5) [1896] A. C. 199.



In both cases the article can be made and sold under the name by which it is known; but in neither case can such use be made of it as to enable a rival to pass off his goods as those of the original maker. If the use of the name alone renders this unavoidable, the name, I apprehend, must not be used.

Having now endeavoured to explain the principle applicable to the present case, I pass to the evidence adduced in it.

For thirty-five years or more the plaintiff has made and sold a sauce which he has called "Yorkshire Relish." This term does not describe the nature of the sauce; the words convey no information whatever of its make or qualities. "Yorkshire Relish" is a non-descriptive trade name, and it is very important to bear this in mind. The composition of the sauce and the mode of making it are known only to the plaintiff and his workpeople—perhaps not even to any one workman. [His Lordship then described the plaintiff's bottles, labels, and wrappers.]

Some years ago the plaintiff registered the words "Yorkshire Relish" as an old trade-mark of his own; but after a long litigation with the defendants these words were expunged from the register on the ground that, although the plaintiff had long called his sauce by that name, the name alone had not been used by the plaintiff to denote his goods (see *In re Powell's Trade-mark* (1); *Powell v. Birmingham Vinegar Brewery Co.* (2)) The words "Yorkshire Relish" are not, therefore, per se a registered trade-mark. They remain, however, as they always have been, the most conspicuous and important words on the plaintiff's labels and wrappers. The plaintiff has invariably taken proceedings to prevent other persons from using the words "Yorkshire Relish" to denote any sauce made by them, and the plaintiff has hitherto succeeded in preventing other people from using that name. The term "Yorkshire Relish" cannot, therefore, be said to have yet become publici juris within the meaning of that expression as applied to trade names and explained in *Ford v. Foster*. (3) The evidence plainly shews the value to the plaintiff of the

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

(1) [1893] 2 Ch. 388.

(2) [1894] A. C. 8.

(3) L. R. 7 Ch. 611.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

name of "Yorkshire Relish." The name not only denotes a particular kind of sauce, but it denotes the sauce which the plaintiff and he alone has hitherto made. Those persons who are in the trade or who read all that is on the labels know that "Yorkshire Relish" is the sauce made by the plaintiff for which he is famous. At the same time it is true that great numbers of ordinary retail buyers are guided by the words "Yorkshire Relish"; such persons do not attend to anything else on the labels. So long as "Yorkshire Relish" are the conspicuous words an alteration in the label does not attract the attention of the great majority of buyers or give rise to any suspicion that the sauce with the altered label is not the same, or does not come from the same maker, as that which they are accustomed to buy or have been told to ask for. The evidence on this point is very strong—so strong that I doubt the possibility of any one selling sauce in ordinary round glass sauce bottles with "Yorkshire Relish" conspicuous upon them without misleading the public and seriously injuring the plaintiff. What might happen if a rival maker of "Yorkshire Relish" sold it in bottles unlike ordinary glass sauce bottles, or in some other vessel wholly unlike the bottles used by the plaintiffs, or at prices so dissimilar as to attract attention, there is no evidence to shew. Perhaps it would not be worth anybody's while to attempt to create a trade in "Yorkshire Relish" under such conditions.

The defendants having succeeded in removing from the register the words "Yorkshire Relish" as a separate trade-mark, have determined to try and make a sauce like "Yorkshire Relish," and to sell it under that name. They have succeeded in making a sauce so like in appearance, taste, and smell to the plaintiff's sauce that it is difficult to distinguish the one from the other. But still the defendants have not discovered the plaintiff's secret, and the sauce made by the defendants is not the same as that sold by the plaintiff; it is not made from his recipe; and it is not in all respects like the plaintiff's sauce. The defendants have taken care not to imitate the plaintiff's label nor his trade-mark of a plate. Moreover, the defendants print their own names in conspicuous letters on

their own label. They have a round gilt disc instead of a round blue plate, and they now sell their own sauce in pink, and not white, wrappers. In short, when both the plaintiff's and the defendants' sauces are looked at as they are sold, the differences between the two are apparent enough to any one whose attention is drawn to them. But the resemblances are as conspicuous as the differences. The round disc used by the defendants is a substitute for the plaintiff's round plate. The bottles themselves are alike in shape, size, and appearance, and the words "Yorkshire Relish" are impressed into the glass. The prices at which the defendants sell to grocers are lower than the plaintiff's price; but the price paid by the customers to retail grocers is the same—namely,  $4\frac{1}{2}d.$  for the small bottles. But, above all, the words "Yorkshire Relish" are as conspicuous on the defendants' bottles as on the plaintiff's. The consequence is that, notwithstanding the differences to which I have alluded, the evidence proves that the defendants' sauce can be, and in fact is, easily mistaken by ordinary buyers for the sauce which the plaintiff has long made and sold, and still makes and sells, under the name of "Yorkshire Relish." This fact is undeniable.

I pass over the defendants' price-lists and show-cards, for, although they are of considerable importance, there is other evidence far stronger which proves the statement I have made. [His Lordship then referred to the evidence, and continued:—]

I cannot, therefore, say that the differences between the bottles as sold are sufficient to prevent mistakes. They do not. What is the legal consequence? It follows from what I have stated in the earlier part of my judgment that the plaintiff is entitled to be protected. The case falls within the principles acted upon in the *Glenfield Starch Case* (1), the *Excelsior White Soft Soap Case* (2), *Seixo v. Provezende* (3), the *Angostura Bitters Case* (4), and the *Stone Ale Case* (5), and in *Reddaway v. Banham* (6) in the House of Lords. In most if not in all of these cases the defendants took care to put their own names on the

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

(1) L. R. 5 H. L. 508.

(2) 1 H. & M. 447.

(3) L. R. 1 Ch. 192.

(4) 7 Ch. D. 801.

(5) 41 Ch. D. 35; [1891] A. C. 217.

(6) [1896] A. C. 199.

C. A.  
 1896  
 POWELL  
 v.  
 BIRMINGHAM  
 VINEGAR  
 BREWERY  
 COMPANY.  
 Lindley L.J.

goods they sold. So did the defendants in the *Singer Manufacturing Co. v. Loog* (1) on the brass plate which they were restrained from using. (2) Great reliance was placed by Mr. Moulton on what Fry L.J. said in the *Angostura Bitters Case* (3); but the learned judge was there considering whether the defendant could be restrained from using those words absolutely, and he came to the conclusion that he could not. This was quite right; for to have granted an injunction to restrain the use of those words simply would have been to go too far. In that very case, however, an injunction was granted as already stated.

The defendants say that they do not want to pass their goods off for the plaintiff's; but they do in fact cause them to be so passed off; and, although I have no doubt the defendants do not want to transgress the law, yet they do want to trade on a reputation which does not belong to them, and which has been earned by and belongs to the plaintiff. This is, to say the least, very unfair. It follows from what I have said in the earlier part of the judgment that the plaintiff is entitled to be protected from what the defendants are doing. Stirling J. has so decided, and has granted an injunction which is, in effect, an injunction not to restrain the defendants from selling their sauce as "Yorkshire Relish" without any qualification, but to restrain them from doing so without better distinguishing their sauce from the sauce made and sold by the plaintiff. For the reasons I have already given, my opinion is that the judgment appealed from is right, and that the appeal must be dismissed with costs.

I do not shrink from the conclusion that the defendants may find it practically impossible profitably to compete with the plaintiff in his trade. I do not see the injustice of such a conclusion, nor do I see that the public will greatly, if at all, suffer by it. After all, the defendants' sauce is not what has hitherto been known as "Yorkshire Relish," although the defendants do all they think they safely can to lead people to suppose it is. The defendants can make and sell their sauce as much as they please; they may even sell it under the name

(1) 18 Ch. D. 395. (2) 8 App. Cas. 18, 35, 42. (3) 7 Ch. D. 813.



of "Yorkshire Relish," if they can do so without misleading buyers and so injuring the plaintiff. If that is done the plaintiff may lose his trade, but no right of his will be infringed. But if it is impossible to comply with such conditions and yet profitably compete with the plaintiff (as probably it is) the defendants must drop the name. Such a possible result was distinctly pointed out by Bowen L.J. and by myself when this case was formerly before the Court. (1)

The defendants have had full warning of the difficulties in their way and of the risk they would run if they attempted to do what they have in fact done. They have deliberately tried an experiment and it has failed.

KAY L.J. The defendants appeal from a judgment granting a perpetual injunction to restrain them "from using the words 'Yorkshire Relish' as descriptive of or in connection with any sauce or relish manufactured by them, or sauce or relish (not being of the plaintiff's manufacture) sold or offered for sale by them, without clearly distinguishing such sauce or relish from the sauce or relish of the plaintiff," and an account of profits and costs.

The law relating to this subject may be stated in a few propositions:—

(1.) It is unlawful for a trader to pass off his goods as the goods of another.

(2.) Even if this is done innocently it will be restrained: *Millington v. Fox*. (2)

(3.) A fortiori if done designedly, for that is a fraud.

(4.) Although the first purchaser is not deceived, nevertheless if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal: *Sykes v. Sykes*. (3)

(5.) One apparent exception is, that where a man has been describing his goods by his own name, another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers: *Burgess v. Burgess* (4); *Turton v. Turton*. (5)

(1) See *In re Powell's Trade-mark*,  
[1893] 2 Ch. 401.

(2) 3 My. & Cr. 338.

(3) 3 B. & C. 541.

(4) 3 D. M. & G. 896.

(5) 42 Ch. D. 128.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Lindley L.J.

C. A.  
1896  
POWELL  
?  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Kay L.J.

(6.) But this exception does not go far. A man may so use his own name as to infringe the rule of law: "It is a question of evidence in each case whether there is false representation or not": per Turner L.J. in *Burgess v. Burgess*. (1) So he may be restrained if he associates another man with him so that under their joint names he may pass off goods as the goods of another person: *Croft v. Day* (2); *Clayton v. Day* (3); *Melachrin v. Melachrin Egyptian Cigarette Co.* (4)

(7.) Another apparent exception is, where a man has under a patent had a monopoly for fourteen years, and has given the article a descriptive name, he cannot when the patent has expired prevent another from selling it under that name: *Young v. Macrae* (5); *Linoleum Manufacturing Co. v. Nairn*. (6)

(8.) I am not sure this would be so if the name so used were the name of the patentee, or even a purely fanciful name not descriptive.

(9.) Certainly, where there has not been a patent, and an article has been made and sold under a fanciful name not descriptive, so that the article as made by one person has acquired reputation under that name, another trader will not be permitted to use the name for a similar article made by him: *Braham v. Bustard* (7); *Cochrane v. Macnish & Son*. (8)

(10.) To this last proposition there is again a limitation. If the first maker has slept upon his rights, and allowed the name to be used by others until it has become publici juris, the Court will not interfere.

Many of these rules of law and exceptions have been referred to in the present case, and the question is whether it comes within the rules which give protection or within some one of the exceptions.

[His Lordship then stated the facts with reference to the manufacture and sale of the plaintiff's and defendants' sauces, and as to the labels, bottles, wrappers, and method of sale adopted by them respectively, and continued:—]

(1) 3 D. M. & G. 905.

(6) 7 Ch. D. 834.

(2) 7 Beav. 84.

(7) 1 H. & M. 447.

(3) 26 Sol. J. 43.

(8) P. C., February 29, 1896; since

(4) 4 Rep. Pat. Cas. 215.

reported [1896] A. C. 225.

(5) 9 Jur. (N.S.) 322.

The resemblances and the differences between the two seem to me to shew plainly that the defendants tried to make such a general similarity between their label and the plaintiff's as might lead an incautious purchaser to suppose, if he noticed them at all, that the plaintiff had made a modification of his label.

The defendants sent out to retail traders who dealt with them show-cards to put in their shops or windows, with a red ground on which were the words "Yorkshire Relish" in a curve, a circle in the middle with the price marked in it in large characters, and below "Holbrook & Co., London and Birmingham," not saying who were the manufacturers. So in their price-lists, which were headed with the defendants' name and "Sole Makers and Proprietors of Holbrook & Co.'s Sauces and Pickles." "Yorkshire Relish" was afterwards printed in large type without any indication there whose make was referred to.

We have this additional fact: the defendants sold their sauce for a less price per dozen than the plaintiff, and it is proved that some grocers, at any rate, retailed it at precisely the same price which they got for the plaintiff's. So that there was a direct inducement to buy the defendants' sauce and pass it off as the plaintiff's to any customer who asked as usual for "Yorkshire Relish" only.

Counsel for the defendants avowed with a candour that was startling that the defendants' object was to obtain a share in the trade in "Yorkshire Relish." What, in 1893 and 1894, was that trade? It was an enormous sale by the plaintiff alone of his sauce by that name. No one else sold "Yorkshire Relish," nor, except in the instances which the plaintiff put a stop to, as I have mentioned, had ever done so. Therefore, to obtain a share of that trade could only be by selling something which purchasers would believe to be the plaintiff's sauce. The learned judge in the Court below seems to have acquitted the defendants of any dishonest intention. I confess I come to the conclusion that the defendants have made a deliberate, careful, and elaborate attempt to pass off their sauce as that of the plaintiff, and to reserve to themselves the usual defence that no one would be deceived who laid the bottles side by side and attentively studied

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Kay L.J.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Kay L.J.

the labels on each. The defendants seem to have traded on the well known fact that the ordinary purchaser never does this. He asks for an article like this by the name "Yorkshire Relish," and probably never notices the name of the maker at all.

Mr. Moulton argued that if the defendants' trading was calculated to pass their goods off as those of the plaintiff, they would be restrained, even if the sauces were identical, and therefore it was not material whether they were the same or not. I altogether disagree. If, as I think, the defendants intended to pass off their sauce as that of the plaintiff, their conduct is more inexcusable, seeing that the two sauces were not the same.

Such trading is, in my opinion, fraudulent, and ought to be restrained on that ground.

But, supposing there was not such a design as I infer, could the Court, acting according to its well settled rules, allow the defendants to continue to trade in this manner?

The defendants urged that the plaintiff has no right to the exclusive use of the words "Yorkshire Relish," and that to prevent the defendants from using them as they are doing would in effect be to give the plaintiff the exclusive use of those words. That argument has been answered in the words which I have quoted from Bowen L.J.'s judgment.

In *Montgomery v. Thompson* (1) Lord Herschell said: "The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name."

There is evidence in this case that retail traders, when asked for Yorkshire Relish, without more, do, in many cases—I think eleven instances are given—supply the defendants' sauce and at the same retail price as is given for the plaintiff's. Moreover, there is evidence that bonâ fide purchasers wanting the plaintiff's sauce have been deceived and have discovered—

(1) [1891] A. C. 220.



in one instance, at least, from the taste—that they have received the defendants' sauce for the plaintiff's. Without this evidence I should have inferred that what the defendants are doing would be calculated to deceive. This evidence confirms that view. Therefore, on this ground, if there were no suspicion of a fraudulent intention, the plaintiff would be entitled to an injunction.

It was argued that the plaintiff has nothing to do with the deception of the public. The answer is obvious. Every person who, intending to buy a bottle of the plaintiff's sauce, gets instead a bottle of the defendants' is a customer taken from the plaintiff by this deceit; and if this is extensively done the damage to the plaintiff's trade would be serious.

Then does this case come within any of the exceptions to the general rule? The words "Yorkshire Relish" are not descriptive in any sense. They do not relate to the character or quality or geographical origin of the goods. Except that the plaintiff has a manufactory at Leeds which may have suggested the use of the word "Yorkshire," it does not appear why that word was used if not to indicate a peculiar sauce of the plaintiff's manufacture.

The plaintiff never had a patent for this sauce. The exception established in the case of a patentee who has used a descriptive name which has become the name of the patented article during his monopoly had no application here.

It was sought to bring the case within that class where a man has been allowed to use his own name, even though the use of it might be calculated to deceive, and reference was made to a decision of the Court of Appeal in *Reddaway v. Banham* (1), where a manufacturer of belting for driving machinery, composed partly of camels' hair mixed with other materials, called his manufacture "Camel-hair Belting." Another manufacturer who made similar belting adopted the same name, and the Court held that he was entitled to do so, because by doing so he was telling the exact truth, his belting being made "substantially" of camels' hair. One difficulty in that case is shewn by the word "substantially." Camel-hair

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWER  
COMPANY.

Kay L.J.

(1) [1895] 1 Q. B. 286; in H. L. [1896] A. C. 199.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
Kay L.J.

belting was not an accurate description of either the plaintiff's or defendant's manufacture; each contained a portion of camels' hair, but each might quite as accurately have been called by the name of any other of the substances woven into the belting: and as the plaintiff's belting had become known by a name which did not properly describe it, such name might be considered an arbitrary name which could not well be used by a rival manufacturer without passing off his goods as those of the plaintiff.

That case was appealed to the House of Lords and has just been reversed, the Lord Chancellor, according to the report in the *Times*, holding that, although the name was descriptive, the use of it enabled the defendant, according to the evidence, to pass off his manufacture as that of the plaintiff, and that therefore an injunction should be granted.

None of the exceptions to the general rule of law that no one should trade so as to pass off his goods as those of another person seems to me to apply to this case.

The authority most nearly in point is that of *Braham v. Bustard*. (1) The plaintiff there had manufactured a new article to which he gave the name of "Excelsior White Soft Soap." It was proved to the satisfaction of the Court that the plaintiffs' goods, and their goods only, were known in the market by that name from December to June, about six months, and the defendant was restrained from using the same name for soap manufactured by him. The Vice-Chancellor distinguished *Young v. Macrae* (2) because it was proved that paraffin oil was and had long been known as the scientific name of that article. This has been followed in the Privy Council, February 29, 1896 (3), where, in an appeal from Jamaica, the use of the words "Club Soda" was restrained where the plaintiff had used those words since 1887 for soda water manufactured by him in Ireland and sold in Jamaica.

The form of the injunction in this case follows that approved in the House of Lords in *Johnston v. Orr Ewing*. (4)

(1) 1 H. & M. 447.

(3) *Cochrane v. Macnish & Son*,

(2) 9 Jur. (N.S.) 322.

[1896] A. C. 225.

(4) 7 App. Cas. 219, 234.

For the reasons which I have given I think that this appeal should be dismissed with costs.

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

A. L. SMITH L.J. In my judgment the real question to be decided in this case is one of fact, which is, Has the plaintiff established that the defendants have been passing or attempting to pass off, or enabling others to pass off, their goods in such a way as to be calculated to lead purchasers to believe that when purchasing the defendants' goods they were purchasing the plaintiff's?

If this be proved the plaintiff, in my judgment, is entitled to the injunction he has obtained.

The proved facts are these: Some thirty-four years prior to the year 1894 the plaintiff commenced making from a secret recipe a sauce which he called by the name of "Yorkshire Relish." This was a name which he invented for the occasion. It described no ingredient nor peculiarity of the sauce, nor indicated the maker's name, it was non-descriptive of the sauce, and was, in my opinion, purely a fancy name given to the sauce which the plaintiff was then about to bring out and place upon the market. [His Lordship then shortly stated the facts of the case, and continued:—]

It is not suggested by the plaintiff that he has any right under any statute to the exclusive use of the words "Yorkshire Relish," nor that he has any right at law to a monopoly in the words; but what he asserts is that the defendants have been passing and are attempting to pass off, and enabling others to pass off, the defendants' sauce as the sauce of the plaintiff, under such circumstances as are calculated to deceive purchasers. It was well known to all connected with the sauce trade that "Yorkshire Relish" denoted sauce manufactured by the plaintiff.

What the defendants have done is this: they have made a sauce which appears from the evidence to be as regards taste, when used upon food, about as like to the plaintiff's sauce as they could well make it without knowing the plaintiff's secret recipe; but the evidence shews that it certainly is not the same sauce, but a different sauce to the plaintiff's.

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

A. L. Smith L.J.

Not one of the defendants' witnesses could say that it was the same sauce, one saying that it was "a wonderful match," and this I take to be the truth.

[His Lordship then stated the facts as to bottles and wrappers used by the plaintiff and the defendants respectively, and as to the similarity and differences between them, and continued:—]

But I need not refer further to these dissimilarities or similarities, for in my judgment this is not the point upon which the case has to be determined. If it had been, I may say that I agree with the evidence obtained out of the plaintiff's own witnesses upon cross-examination, that if all purchasers of "Yorkshire Relish" sauce looked at the wrappers or labels of the defendants they would see that what they were buying was Holbrook's "Yorkshire Relish," and not Goodall, Backhouse & Co.'s "Yorkshire Relish."

But although this is so, it is said by the plaintiff that the evidence shews that large numbers of those who purchase "Yorkshire Relish" sauce were not only likely to be deceived, but in fact many had been deceived by what the defendants were doing, and I will deal with this evidence hereafter.

It is not denied that for thirty-four years down to 1894 the plaintiff was the sole maker of the sauce known as "Yorkshire Relish"; excepting upon occasions when others sought to imitate it and to sell their imitations under such circumstances that they were promptly stopped by injunctions obtained by the plaintiff.

There is no pretence for saying that the name had become *publici juris*. Mr. Moulton, when asked what it was that prompted his clients to take for their sauce the name of "Yorkshire Relish" and to give the name such prominence upon their wrappers and labels, and why they were not content to call their sauce either as "Holbrook's Sauce" or "Holbrook's Relish," or by the name of any other relish they might choose other than "Yorkshire Relish" (and there are many other relishes known in commerce), at once boldly stated that the defendants' object was (and indeed it was obvious without his statement) to compete with the plaintiff in his sale of "Yorkshire Relish"; and he said that by law the defendants were entitled to do so, for



the only right which the plaintiff had was that no one should sell his sauce as the sauce of the plaintiff, and that what the defendants were doing was, to trade, not in Goodall, Backhouse & Co.'s "Yorkshire Relish," but in Holbrook's "Yorkshire Relish," and thus to do a service to the public.

I agree that fair and honest competition in itself is lawful and beneficial to the public; but when a trader avows that his object in taking an old, well known fancy name of an article of high repute and of vast value is to cut into the established trade of another and undersell him if possible, which is in fact what the defendants are attempting to do in the present case, he must be careful when he so acts to the injury of the other that it cannot with truth be said that he is attempting to pass off his goods as the goods of the other.

As I have already said, in my opinion the wrappers and labels of the defendants are in themselves distinct from the wrappers and labels of the plaintiff; but the defendants have throughout taken, and given great prominence to, the words "Yorkshire Relish" for reasons which can easily be surmised, and the question is, Can they by law do so?

There is good evidence in this case, looking to the way the defendants have acted, the closeness with which they have throughout been sailing to the wind—by which I mean going as near to the plaintiff's wrappers and labels as they dared to go—and their then giving way and resorting to other devices—to their price-lists and their show-cards (I leave out the alleged statements of Willcox, their traveller), and to the fact that they have taken the well known fancy name by which the plaintiff's sauce has ever been known, from which a judge, if so minded, would have been well warranted in finding that the defendants in what they have done intended to pass off their goods as the goods of the plaintiff. I cannot doubt that this is so.

I do not, however, recapitulate this evidence which Mr. Graham Hastings called our attention to, for the learned judge has not based his judgment upon the ground of intention to deceive, but upon the ground that the defendants' acts were calculated to deceive, which of itself is sufficient to support the

C. A.

1896

POWELL

v.

BIRMINGHAM

VINEGAR

BREWERY

COMPANY.

A. L. Smith L.J.

C. A. injunction irrespective of whether there was an intention to  
1896 deceive or not.

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

A. L. Smith L.J.

Now, as to whether the defendants' acts were calculated to mislead purchasers, the evidence in my judgment is irresistible.

It establishes first of all, as above stated, that during thirty-four years prior to 1894 the name "Yorkshire Relish" denoted the sauce which during that period has been manufactured by the plaintiff and by no one else.

It establishes that a large class of consumers of "Yorkshire Relish," as well as many retail dealers, for years have been accustomed to purchase the plaintiff's sauce by the name it was so well known to them all, namely, "Yorkshire Relish" wholly irrespective of wrappers or labels, and in many cases of the name of the maker.

It establishes that "Yorkshire Relish" is what they have asked for, and the plaintiff's "Yorkshire Relish" is what they have been always theretofore supplied with, until the defendants put their substitute upon the market, when the consumers got the defendants' manufacture in the place of the plaintiff's manufacture. It was established that the defendants' methods not only were likely to deceive purchasers, but proof was given of actual deception. I allude to the cases of the Reeces, the Browns, the Joneses and the Jacksons, the first three having reference to purchasers being supplied with the defendants' sauce in bottles with their white wrapper on when "Yorkshire Relish" was asked for, and the last to the purchase of a bottle of sauce with defendants' pink wrapper on. These cases the learned judge believed, and I do not doubt he was right when he did so.

In each of these cases "Yorkshire Relish" was what was asked for, obviously meaning the old, well known condiment, and the applicants got in its place the new sauce made by the defendants.

It was also proved that grocers in numerous cases (some ten uncontradicted test cases), when asked to supply over the counter "Yorkshire Relish," supplied the defendants' sauce, and it may be added by so doing they made a larger profit than they would have done had they supplied the plaintiff's sauce,

inasmuch as the defendants supplied their sauce which they called "Yorkshire Relish" to the grocers at 3s. per dozen, the plaintiff's "Yorkshire Relish" being invoiced to the grocer at 4s. 3d. per dozen, the same price in each case being charged to the customer.

Mr. Buckley sought to evade the mass of evidence which was given upon these heads, not by contradiction, for the evidence was really all one way, but by arguing that the purchaser was not deceived, because he did not purchase "Yorkshire Relish" as being made by the plaintiff, but only "Yorkshire Relish" of a particular taste, or, as he said, as being the name of a particular article which tickled the palate in a particular way, and that was all the purchaser cared for, and that was what he got when supplied with the defendants' sauce. He also said that, as to taste, the defendants' "Yorkshire Relish" was similar if not identical to the plaintiff's "Yorkshire Relish"; and, therefore, the purchaser, having got what he had asked for, was not deceived.

In my judgment the facts do not warrant this argument; for what the purchasers in truth asked for was either the old "Yorkshire Relish" made by the plaintiff which they had been accustomed to buy, or, if they did not know the plaintiff made it, then for "Yorkshire Relish" made by the same maker whosoever he might be; and instead thereof they got the new manufacture of the defendants. Every bottle so supplied was a loss to the plaintiff.

Whether the taste of the defendants' sauce was the same as the taste of the plaintiff's sauce I very much doubt, and indeed, to my mind, there is good evidence that it was not, and I say that the weight of the evidence shewed that the defendants' sauce was more salt than the plaintiff's, though I have no doubt the defendants made their sauce as like the plaintiff's as they possibly could without knowing his secret recipe.

In many cases it passed muster—in others it did not.

That the acts of the defendants' were calculated to deceive purchasers has, in my judgment, been clearly established. But it was argued by Mr. Moulton that the defendants used the words "Yorkshire Relish" in the least objectionable way

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

A. L. Smith L.J.

C. A. possible, and that, as the plaintiff had at law no monopoly in the words, the defendants were entitled to take them and use them as they have done.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

A. L. Smith L.J.

This is not, I would point out, the case of a man making the identical article which another has made and called by a fancy name, but it is the case of a man making another article and calling it by the same fancy name.

Whether, in the first case, he could do so, if it tended to mislead, I have not now to decide; but I very much doubt it, and I think he could not—the question here is whether in the second case he can do so.

Suppose that the words “Yorkshire Relish” have obtained such a significance in the market that it is impossible either by dressing them up or by coupling them with other words to render them innocuous and incapable of misleading buyers, what then? Are the defendants entitled to take and use this old, well known fancy name denoting the plaintiff’s goods, and thereby filch from the plaintiff his old-established trade; or must they leave the fancy name alone?

This, in my judgment, is the point in this case. Mr. Moulton says that even so the defendants may take the name; but I am of opinion that this is not so, and that they must leave the name alone if they cannot render it otherwise than misleading to purchasers. It may be that the result of such a state of things is that it gives to the plaintiff a practical monopoly in the words which otherwise he would not have, and it appears to me, so far as the evidence as to this in the present case goes, that this is so.

Whether it is possible to mask the words “Yorkshire Relish” so that they will become innocuous, such as by selling “Yorkshire Relish” in jars or tins or barrels, I do not know; but it would seem that if this be possible, and it be done so that the words do not mislead, then the object which I have no doubt the defendants have in using the words will be thereby frustrated.

It is said that this puts the plaintiff in the same position as if he had a registered trade-mark or a patent unexpired; but this point was dealt with by three of the learned Lords in the



House of Lords in the "Stone Ale" case: *Montgomery v. Thompson*. (1) In that case, as in the present, the plaintiff had no monopoly in the words "Stone Ale."

Lord Herschell says (2): "The respondents" (i.e., the plaintiffs in that case) "are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name"; and Lord Watson (3) doubted the possibility of the word ("Stone Ales" in that case, which had a history very similar to the words "Yorkshire Relish" in this case) being taken; and Lord Macnaghten pointed out that (4), "It would have been impossible for the defendant to have called his ales 'Stone Ales,' and to have distinguished his ales from those of the plaintiff. Any attempt to distinguish the two, even if honestly meant, would have been perfectly idle."

The difficulty the defendants now find themselves in, in attempting as they are doing to obtain the benefit of the well known fancy name of the plaintiff's "Yorkshire Relish" as being their "Yorkshire Relish," was clearly pointed out to them by Bowen L.J. when they were applying to have the plaintiff's trade-mark expunged. Bowen L.J. then said (5): "In this particular case it is perfectly true that 'Yorkshire Relish' denotes the article which is made by, and has been made for many years by, the appellant's firm, and it looks extremely unlikely that any person, even the respondents, could now use the term 'Yorkshire Relish' without running great risks. But if 'Yorkshire Relish' is not a term to which the appellant has the exclusive right, it is conceivable that the respondents or any other persons in the trade might by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they are selling from the

C. A.

1896

POWELL

v.

BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.

A. L. Smith L.J.

(1) [1891] A. C. 217.

(3) [1891] A. C. 222.

(2) *Ibid.* 220.(4) *Ibid.* 225.

(5) [1893] 2 Ch. 407.

C. A.  
1896  
POWELL  
v.  
BIRMINGHAM  
VINEGAR  
BREWERY  
COMPANY.  
A. L. Smith L.J.

sales of the appellant's sauce, or so distinguish the manufacture of the article which they manufacture from the manufacture of the appellant's sauce, as to prevent the possibility of the outside customer being deceived. It is impossible for a Court of Law to say that it might not be done, and if it can be done, the trade have a right to have that door left open to them."

The door was thus left open to the defendants with this warning; and it appears to me clear upon the evidence which has been given in this case that the defendants, although they have used all sorts of contrivances by which to use the words "Yorkshire Relish" so as to be of use to themselves, yet have not by what they have done prevented the public from being deceived; for the large body of evidence given upon this point, which the learned judge has rightly believed, shews that it is otherwise, and that the defendants by what they have been doing have caused their goods to be sold as the goods of the plaintiff.

Since writing this judgment the case of *Reddaway v. Banham* has been decided in the House of Lords. (1)

It is an a fortiori case to the present, for in *Reddaway v. Banham* the words "Camel-hair Belting" were admitted to be descriptive of the article sold, and not a mere fancy name given to an article by which it has become known to the public; and yet it was held that a rival in trade could not use the name if by so doing he represented his goods as the goods of another.

This appeal must be dismissed with costs.

Solicitors: *Thorowgood, Tabor & Hardeastle; J. S. Salaman.*

(1) [1896] A. C. 199.

W. W. K.

BIGGERSTAFF *v.* ROWATT'S WHARF, LIMITED.

[1894 B. 4911.]

C. A.

1896

April 14, 15.

HOWARD *v.* ROWATT'S WHARF, LIMITED.

[1894 H. 3627.]

*Set-off—Floating Security—Liquidated Demand—Hypothecation—Powers of Managing Director—Presumption of Regularity.*

A limited company agreed to sell to H., B. & Co. 7000 barrels out of their stock at 3s. 6d. each. H., B. & Co. paid for them; but the company fell into difficulties, its stock of barrels was exhausted, and as to more than 4000 it failed to deliver them. The company had to the knowledge of H., B. & Co. issued debentures in the usual form of floating securities on all the property of the company. The debenture-holders obtained the appointment of a receiver, at which time H., B. & Co. owed the company a liquidated sum for rent, and had the above claim against the company in respect of the barrels:—

*Held* (reversing the decision of North J.), that the claim of H., B. & Co. against the company was a liquidated claim of 3s. 6d. for each barrel not delivered, there being as to each such barrel a total failure of consideration which entitled H., B. & Co. to recover back their purchase-money:

*Held*, further, that H., B. & Co. could set off this demand against what they owed to the company, and that the knowledge of the existence of the debentures as a floating security at the time when the debt due to them was contracted was not such notice of an assignment as to prevent a set-off binding the debenture-holders.

Persons dealing bonâ fide with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company a managing director can have.

Shortly before the appointment of the receiver, H., B. & Co. pressed the company for security for their claim as to the barrels; and at a meeting between them and the three directors of the company it was proposed, but not finally settled, that the company should issue debentures to H., B. & Co. by way of security, and should hypothecate to them various debts owing to the company. This meeting was adjourned to the next day, when only two directors were present (the quorum being three), but D., the managing director, was one of them. At this adjourned meeting H., B. & Co. advanced to the company money to pay wages, and D. gave them a letter, signed by him on behalf of the board, by which, in consideration of H., B. & Co. finding cash for wages and payment of barrels, he agreed to execute a deed in conjunction with the board of directors creating and issuing to them the remainder of an issue of debenture stock; and he also gave to them a number of orders addressed to debtors of the company informing them that the debts due from them were hypothecated to

C. A.  
 1896  
 ~~~~~  
 BIGGERSTAFF
 v.
 ROWATT'S
 WHARF,
 LIMITED.
 ~~~~~  
 HOWARD  
 v.  
 ROWATT'S  
 WHARF,  
 LIMITED.  
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H., B. & Co. These orders were signed by D. as managing director. By the articles of the company the directors were authorized to appoint a managing director, and to delegate to him such of the powers of the board as they thought fit; and it was not disputed that the board had power to hypothecate. There was no minute shewing what powers had been delegated to D., nor of his appointment as managing director, but he had acted as such:—

Held (reversing the decision of North J.), that the hypothecations were valid.

THIS was an appeal by Harvey, Brand & Co. from a decision of North J. on a summons.

In 1893 the company, which was established in 1892 for the purpose of carrying on a wharf, issued a set of debentures by each of which it charged all its real and personal property present and future, and the undertaking, goodwill, and business of the company, and all its uncalled capital for the time being, with the payment of the principal sum of 100*l.* and interest as therein mentioned. Conditions were indorsed, the first of which was as follows:—

“All the within-mentioned debentures rank equally as a first charge upon the property expressed to be charged hereby, and none shall have any priority over others. But the charge by the debentures of this series created shall be a floating security, and shall attach as a fixed charge only if the company go into liquidation or make default in payment of the principal moneys secured by the debentures of this series or any of them, or make default for a period of three months in the payment of any interest due on any such principal, and shall not within one month after receiving notice in writing to remedy such default pay the amount due in respect of such principal or interest. Provided always that the company shall not be at liberty to create any mortgage or charge on, or to sell or dispose of, except by way of lease at a rack-rent, any of its freehold and leasehold land or hereditaments without the consent of a majority in value of the holders of the debentures of this series given at a meeting of such holders convened for the purpose of giving such consent.”

On November 1, 1893, Harvey, Brand & Co. purchased from the company 7000 barrels at 3*s.* 6*d.* each, and on the following

day paid for them and took a receipt; and the company gave them a delivery warrant for 7000 barrels warehoused at the company's wharf. These barrels were not earmarked, the agreement being only for purchase of a certain number of barrels out of the company's stock. Before October 20, 1894, 2784 of the barrels were delivered on this warrant, but no more were forthcoming, the company not having barrels enough to complete their contract, which Harvey, Brand & Co. discovered by October 20, 1894.

On October 22, 1894, a meeting took place between the three then directors of the company, of whom Mr. Davy, the managing director, was one, and Messrs. Harvey, Brand & Co., when criminal proceedings for misappropriation of the missing barrels were threatened, and Harvey, Brand & Co. insisted that the remaining mortgage debentures of the company should be issued in their favour, and the outstanding book debts of the company assigned to them. The meeting was postponed to the following day, when Mr. Davy and only one of the other two directors were present. The directors stated that they had not money to pay wages, and that unless Harvey, Brand & Co. could help them the wharf must be closed. Harvey, Brand & Co. had then a large quantity of oil at the wharf, which made them desirous that it should not be closed, and they agreed to find money for payment of wages, on the repayment thereof and of the moneys due for barrels being secured by the issue and transfer to them of the remainder of the company's debenture stock, and by their having the moneys due to the company from various debtors hypothecated to them. Mr. Davy then signed and gave to Harvey, Brand & Co. the following letter:—

“Messrs. Harvey, Brand & Co.

“In consideration of your finding cash for wages and payment of barrels, I undertake to execute the deed (in conjunction with the board of directors) creating and transferring to you the remainder of the issue of £25,000 debenture stock.

“On the part of the board,

“Yours truly,

“Jas. M. Davy.”

C. A.
1896
BIGGERSTAFF
v.
ROWATT'S
WHARF,
LIMITED.
—
HOWARD
v.
ROWATT'S
WHARF,
LIMITED.
—

C. A. He also gave to Harvey, Brand & Co. a number of letters of hypothecation, of which the following is a specimen :—

1896

BIGGERSTAFF

v.

ROWATT'S
WHARF,
LIMITED.

HOWARD

v.

ROWATT'S
WHARF,
LIMITED.

“ Memorandum.

“ London, 23 Oct. 1894.

“ From Rowatt's } to Messrs. J. G. Rollins & Co.,

“ Wharf, Limd. } “ Old Swan Wharf, E.C.

“ Dear Sir,

“ By this please note that all charges now due or to accrue due on goods at Rowatt's Wharf are hereby hypothecated to Messrs. Harvey, Brand & Co., 62, New Broad Street, E.C.

“ Yours truly,

“ Rowatt's Wharf, Limd.

“ Jas. M. Davy,

“ Mg. Director.”

The articles contained the following provisions as to the powers of a managing director :—

Art. 81: “ The directors may from time to time appoint a managing director, and when they think fit remove any managing director so appointed, and they may from time to time entrust to and confer upon any such managing director such of the powers, authorities, and discretions exercisable under these presents by the directors as they may think fit, other than the drawing, accepting, or indorsing of bills of exchange or promissory notes, and may confer such powers for such time and to be exercised for such objects and purposes and upon such terms and conditions and with such restrictions as they think expedient, and may from time to time revoke, withdraw, alter, or vary all or any of such powers, and may from time to time fix the remuneration of such managing director, either in addition to or in substitution for his remuneration as a director.”

By art. 82 the directors had power to fix the quorum, but until otherwise determined three were to form a quorum, and this had not been altered.

By art. 90 the directors might exercise all such powers and do all such acts as might be exercised or done by the company,

and were not by the articles or by statute required to be done in general meeting.

There did not appear in the directors' minute-book anything to shew what powers had been conferred on Mr. Davy as managing director, nor was there even any minute of his appointment; but he had been recognised and had acted as managing director. In October, 1894, there were only three directors.

Neither of the above meetings was called in a regular way as a meeting of directors, nor was there any entry of them in the directors' minute-book.

On October 30, 1894, an order was made in a debenture-holder's action of *Hall v. Rowatt's Wharf* for the appointment of a receiver and manager. This action was afterwards consolidated with *Biggerstaff v. Rowatt's Wharf*, and divers moneys were got in by the receiver and manager and paid into court.

Harvey, Brand & Co. were, on October 30, 1894, indebted to the company for rent in respect of storage-room for goods deposited by them at the wharf. They now took out a summons claiming a set-off of the moneys due from the company to them, in respect of the barrels and the advance for wages, against what they owed to the company, which would leave the company indebted to them; and also claiming to be paid the moneys paid into court in respect of the debts mentioned in the letters of October 23, 1894.

North J. held that there was no valid hypothecation of the debts by the letters of October 23. His Lordship thought that if on the 22nd the directors then present had determined to make an assignment of the debts due to the company the hypothecation would have been valid, inasmuch as they were all the directors, and the facts that they had not been summoned to a meeting, and that there was no minute of what they had done, would not have invalidated their acts; that nothing, however, was then settled, and, as on the following day only two of the three directors were present, the company was not bound. As to the authority of the managing director to hypothecate alone, it was plain that Harvey, Brand & Co.

C. A.

1896

BIGGERSTAFF

v.

ROWATT'S
WHARF,
LIMITED.

HOWARD

v.

ROWATT'S
WHARF,
LIMITED.

C. A.
1896
BIGGERSTAFF
v.
ROWATT'S
WHARF,
LIMITED.
—
HOWARD
v.
ROWATT'S
WHARF,
LIMITED.
—

had been dealing with the body of directors, and had never relied on any such authority. As to the set-off, his Lordship thought that the claim of Harvey, Brand & Co. in respect of the barrels was for unliquidated damages, and that this and the liquidated claim for rent could not be set off against each other. His Lordship, therefore, refused to make any order in favour of Harvey, Brand & Co.

Swinfen Eady, Q.C., and *F. L. Wright*, for the appeal. As regards set-off, the demand of Harvey, Brand & Co. for the barrels was liquidated. No property passed in any barrels but those delivered; and as to the others, there was a total failure of consideration, which entitled Harvey, Brand & Co. to have their purchase-money back. They had, therefore, a demand which could be set off; and the floating security created by the debentures could not override the set-off of a debt accrued due before the appointment of a receiver.

As to the letters of hypothecation, we say that their signature by Davy as managing director was effectual. By the articles the directors had power to delegate to him all the powers of the board except as to bills of exchange and promissory notes. He therefore was not doing anything *ultra vires* of a managing director; and Harvey, Brand & Co. had a right to assume that as managing director he had all the powers which by the constitution of the company he could have, there being nothing to lead them to a suspicion that he had not. The principle that irregularities do not affect a person who deals *bonâ fide* with a company without notice of them is strongly exemplified by *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* (1), where a deed was held to be validly executed in favour of a mortgagee, though in fact the directors who ordered the seal of the company to be affixed were not a quorum. The judgment of Lindley L.J. in that case shews the law on the subject.

Cozens-Hardy, Q.C., and *Upjohn*, for the plaintiffs. The claim of Harvey, Brand & Co. is for unliquidated damages for breach of contract, and cannot be set off. In order to enable

(1) [1895] 1 Ch. 629.

them to reclaim their purchase-money as money had and received, there must be a total failure of consideration, which here there was not, for a large portion of the barrels was delivered. Then the statutes of set-off do not apply till the defendant raises the defence in an action. The first statute was 2 Geo. 2, c. 22, and until it was passed there was no such thing as set-off known to the law—a cross-action had to be brought. 8 Geo. 2, c. 24, made the former Act perpetual. It has never been held that set-off was a right inherent in the debt which prevailed against an assignee: the right to set-off only arises when an action is brought. The debenture-holders are assignees of the property of the company before any right of set-off had accrued. A debenture as soon as it is issued creates a charge on the property of the company subject to a licence to the company to use its property in the course of its business, and this charge prevails against an execution creditor: *In re Standard Manufacturing Co.* (1); *In re Opera, Limited* (2); *Taunton v. Sheriff of Warwickshire*. (3) To take an item of the property out of the charge there must be a specific dealing with it. We do not dispute that if before the appointment of a receiver the company's agent and a debtor to the company meet and conclude an arrangement the arrangement is good against the debenture-holders. Nor do we dispute that if before the appointment of a receiver the company brings an action, and the defendant pleads a set-off, the existence of the debentures does not make that plea invalid. Here we have a charge created by the debentures subject to a licence to the company to deal with its assets, and no dealing with them such as to take the debt due from Harvey, Brand & Co. out of the charge. There is therefore no right of set-off.

As to the hypothecations, the case of *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* (4) was very different from the present. The seal of the company was affixed to the deed, and the mortgagee had a right to presume that it was affixed with due authority. Here Harvey, Brand & Co. were dealing with the directors as a body, and it is

C. A.

1896

BIGGERSTAFF

v.

ROWATT'S
WHARF,
LIMITED.HOWARD
v.ROWATT'S
WHARF,
LIMITED.

(1) [1891] 1 Ch. 627.

(2) [1891] 3 Ch. 260.

(3) [1895] 2 Ch. 319.

(4) [1895] 1 Ch. 629.

.C. A.
 1896
 BIGGERSTAFF
 v.
 ROWATT'S
 WHARF,
 LIMITED.
 —
 HOWARD
 v.
 ROWATT'S
 WHARF,
 LIMITED.
 —

clear from the nature of the transaction, especially looking at the letter of the 23rd, that a confirmation by the body of directors was intended. Harvey, Brand & Co. were not negotiating with Davy as managing director, nor relying on his powers as such.

A reply was not called for.

LINDLEY L.J. It would be a very serious matter to mercantile companies if we were to give effect to the contention of Mr. Cozens-Hardy and Mr. Upjohn.

The first question is that of set-off. The company, which was a wharf company, stored oil for the appellants. The company had issued mortgage debentures in the ordinary form, making them floating securities on the property of the company for the time being. No doubt they created an equitable charge; but they are in the usual form, which gives the company power to carry on its business as if the debentures did not exist, until some default has been made which entitles the debentureholders to take possession. It would be monstrous if a company which had issued debentures could not before default receive debts and make arrangements with creditors. If the issuing debentures had such an effect, it would be impossible for a company which had issued them to obtain credit, or indeed carry on its business at all.

Harvey, Brand & Co., who were oil merchants, used the company's wharf in the course of their business, and on an account rendered they owed the company in October, 1894, a considerable sum for wharfage rent. In 1893 they had bought from the company 7000 barrels at 3s. 6d. each, and paid for them. By October 20, 1894, the company had delivered less than 3000 of the barrels, and were admittedly unable to deliver any more. The barrels were not earmarked, the contract being only for delivery of so many barrels of a particular sort. On the company failing to deliver any more, Harvey, Brand & Co., who had paid for the whole number, became creditors of the company to the amount of 3s. 6d. for each barrel not delivered, there being, as regarded these barrels, a total failure of consideration, which entitled them to have the price back, or to set it

off against any debt due from them to the company. On October 30, 1894, when a receiver was appointed, the company owed Harvey, Brand & Co. more for the barrels than Harvey, Brand & Co. owed them for wharfage rent, and Harvey, Brand & Co. claim to set off against the rent the sum due to them for barrels.

It is urged against this, that their only claim on account of the short delivery is for unliquidated damages for breach of contract. But this is not an action of trover: the barrels had never become the property of Harvey, Brand & Co., and their claim is a liquidated claim to have back, on the ground of total failure of consideration, the price of those barrels which the company failed to deliver.

Then arises another question. The right of set-off is subject to this—that there is no right of set-off against an assignee of whose assignment the person claiming to set off had notice at the time when the debt due to him was contracted, and the debenture-holders say that the debt due to Harvey, Brand & Co. was contracted after Harvey, Brand & Co. had notice of the rights of the debenture-holders. No doubt if the debt due from Harvey, Brand & Co. had been assigned before the debt due to them had been contracted, and Harvey, Brand & Co. had notice of the assignment, the cross demands could not be set off. Mr. Cozens-Hardy urges that in this respect there is no difference between an ordinary assignment and an assignment made by debentures such as these; but I think that there is. It would be impossible for companies to get credit or carry on business at all if arrangements between them and their creditors could not be made without the assent of the debenture-holders. No authority has been cited in support of such a proposition, and it is contrary to the principle that a company can, until the debenture-holders interfere, carry on its business as if the debentures did not exist. The result is that Harvey, Brand & Co. are entitled to the set-off which they claim. North J.'s attention seems to have been directed only to the point that generally a breach of contract only gives a right to unliquidated damages.

The next point is that of the hypothecation of the debts.

C. A.
1896
BIGGERSTAFF
v.
ROWATT'S
WHARF,
LIMITED.
—
HOWARD
v.
ROWATT'S
WHARF,
LIMITED.
—
Lindley L.J.

C. A. The company were in straits, and on October 23 they were on
 1896 the eve of closing their wharf because they were unable to pay
 ~~~~~ the workmen's wages. They ask for assistance from Harvey,  
 BIGGERSTAFF      Brand & Co., and an arrangement was come to that if Harvey,  
 v.      Brand & Co. would advance enough to pay the wages, and so  
 ROWATT'S      enable the company to continue its business, the company  
 WHARF,      would give them security for the advance and the amount due  
 LIMITED.      in respect of the barrels. Mr. Davy then gave to Harvey,  
 ——— Brand & Co. this letter: [His Lordship read the letter of  
 HOWARD      October 23.] At the same time there were given to Harvey,  
 v.      Brand & Co. a number of orders on persons who owed money  
 ROWATT'S      to the company giving them notice that the debts were hypo-  
 WHARF,      thecated to Harvey, Brand & Co. Harvey, Brand & Co. say  
 LIMITED.      they can claim under these as assignments of the debts. It is  
 ——— to be observed that Mr. Davy in his letter to Harvey, Brand  
 Lindley L.J.      & Co. does not purport to undertake to issue the debentures  
 without the assent of the other directors; but the language of  
 the orders on the debtors is quite different. It is said that the  
 company are not bound by those orders because Mr. Davy had no  
 authority to give them. Now, what is the law as to this point?  
 What must persons look to when they deal with directors?  
 They must see whether according to the constitution of the  
 company the directors could have the powers which they are  
 purporting to exercise. Here the articles enabled the directors  
 to give to the managing director all the powers of the directors  
 except as to drawing, accepting, or indorsing bills of exchange  
 and promissory notes. The persons dealing with him must  
 look to the articles, and see that the managing director might  
 have power to do what he purports to do, and that is enough  
 for a person dealing with him *bonâ fide*. It is settled by a  
 long string of authorities that, where directors give a security  
 which according to the articles they might have power to  
 give, the person taking it is entitled to assume that they  
 had the power. The hypothecations, therefore, are in my  
 opinion valid.

LOPES L.J. Harvey, Brand & Co. bought from the company  
 and paid for 7000 barrels. The company failed to deliver part



of them, and the question is whether the claim of Harvey, Brand & Co. in respect of this short delivery can be set off against a debt due from them to the company. When there is a failure to deliver goods, there is generally an option what course the purchaser shall take. One course is an action of trover; but I doubt whether it could be resorted to here, for I do not think that any property in the barrels passed, as they were not earmarked. The other course is to waive the tort and sue for the money produced by the sale of the goods as for money had and received. In the present case I think that Harvey, Brand & Co. could sue for money had and received. Mr. Cozens-Hardy says that to enable a party so to sue there must be a complete failure of consideration; but that is not so where the contract is severable, as it is here. There is a total failure of consideration as regards the barrels not delivered, and the demand is a liquidated demand which can be set off against the rent.

But it is said that there is no right of set-off against an assignee of a chose in action where the person claiming the set-off had notice of the assignment when the debt due to him was contracted. That is quite true in ordinary cases; but a debenture differs from an ordinary assignment. If this doctrine were applied to debentures, no creditor of a company could ever get the benefit of a set-off where debentures had been issued. Now, it is the essence of a floating security that it allows the company to carry on business in its ordinary way until a receiver is appointed; and it would paralyze the business of companies to give to the issuing of debentures the effect now contended for. I am of opinion, therefore, that the set-off must be allowed.

The question as to the hypothecation of debts is quite distinct. It is said that the managing director had no power to hypothecate them. There is no doubt that Mr. Davy was the managing director and acted as such, and according to the articles the directors could have given him the power which he purported to exercise. There is an absence of evidence that they had done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed. p. 159, the law is thus laid

C. A.  
1896  
BIGGERSTAFF  
v.  
ROWATT'S  
WHARF,  
LIMITED.  
HOWARD  
v.  
ROWATT'S  
WHARF,  
LIMITED.  
Lopes L.J.

C. A.

1896

BIGGERSTAFF

v.

ROWATT'S  
WHARF,  
LIMITED.

HOWARD

v.

ROWATT'S  
WHARF,  
LIMITED.

Lopes L.J.

down: "Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless— (1.) their employment was altogether beyond the powers of the directors; or unless, (2.) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. [Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bonâ fide* and without notice of the irregularity in his appointment.] The following cases are important on this point. In *Smith v. Hull Glass Co.* (1) it was held that a company registered under 7 & 8 Vict. c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule J. went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bonâ fide* with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities."

Every word of that applies here. It cannot be said but that Mr. Davy was acting within the limits of his apparent authority, or that Harvey, Brand & Co. were not acting *bonâ fide*, or that they had not a right to assume that Mr. Davy was duly appointed.

KAY L.J. I am obliged to differ from North J. on both points. The company was formed in 1892, and in 1893 it issued debentures in the usual form, so as to be a floating charge. A receiver was appointed on October 30, 1894, up to which time the security was a floating one. Before that event Harvey, Brand & Co. owed the company a liquidated sum. The company owed them a liquidated sum of larger amount, and they had an

(1) 8 C. B. 668; 11 C. B. 897.

inchoate right of set-off. They now claim a right of set-off, and North J. has decided that they have no such right. The point chiefly argued below seems to have been that Harvey, Brand & Co.'s claim against the company was a claim for unliquidated damages. But they bought from the company and paid for 7000 barrels at 3s. 6d. each; there was a short delivery, and they have a claim against the company of 3s. 6d. for each of the barrels which the company failed to deliver. As to those barrels there was a total failure of consideration, and Harvey, Brand & Co. had a liquidated claim for money had and received, and had before the appointment of the receiver an inchoate right of set-off.

Then it was urged that this claim could not be asserted against the debenture-holders, who had a charge on all the property of the company, inasmuch as Harvey, Brand & Co. knew of the debentures. It is true that as against an assignee there can be no set-off of a debt accrued after the person claiming set-off has notice of the assignment. But does that apply to debentures such as these? Counsel hesitated to go so far as that, but said that there was no right of set-off, as no action had been brought in which it could have been asserted before October 30, 1894. I think that is not so. I think that if at the time of the assignment there was an inchoate right to set-off it can be asserted after the assignment, for the assignment is subject to the rights then in existence. The question is whether the assignment took place at the issue of the debentures or at the appointment of a receiver. The debentures contain provisions the effect of which is that the company is at liberty to go on with its business as if the debentures did not exist, until possession is taken under them. From that time the company cannot deal with its assets as against the title of the debenture-holders; up to that time it can deal with them in every legitimate way of business. Therefore the date to be regarded is the time of taking possession. A conclusion that set-off could not arise during the period before taking possession would be injurious to debenture-holders, for it would hamper the company in carrying on its business, and so injure the debenture-holders, whose interest is that the company should carry on a prosperous business.

C. A.

1896

BIGGERSTAFF

v.

ROWATT'S  
WHARF,  
LIMITED.

HOWARD

v.

ROWATT'S  
WHARF,  
LIMITED.

Kay L.J.

C. A.  
1896  
BIGGERSTAFF  
v.  
ROWATT'S  
WHARF,  
LIMITED.  
HOWARD  
v.  
ROWATT'S  
WHARF,  
LIMITED.  
Kay L.J.

There was an inchoate right of set-off at the time when the receiver was appointed; and that, and not the time of issuing the debentures, is the time to be looked to. The debentures must be regarded as incomplete assignments which do not become complete until the time when the receiver is appointed.

There is another point on which, also, I am obliged to differ from North J. Harvey, Brand & Co., seeing the company getting into difficulties, pressed for security for the debt owing to them, and were pressed by the company to help them by an advance to pay wages. So the company gave Harvey, Brand & Co. an agreement to issue debentures to them, and also gave them a series of orders on the debtors of the company. Each of these orders was in the form of a notice of hypothecation, signed on behalf of the company by Mr. Davy as managing director. Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognised as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing ultra vires of a managing director; and it would be extraordinary if a person dealing bonâ fide with the managing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases shewing that a person so dealing with an officer of a company has a right to presume that all has been done regularly. Mr. Cozens-Hardy then contends that Harvey, Brand & Co. were not dealing with Mr. Davy as managing director; that they were dealing with the whole body of the directors, with whom they had a meeting on October 22, at which nothing was concluded, and then next day a meeting was held at which a quorum of directors was not present. This, he contends, shews that it was not intended that anything should be done but by the body of directors. It seems to me that on the 23rd it was considered that the arrangement had been virtually come to on the 22nd, and no discussion seems to have taken place about the terms: the matter seems to have



been treated as settled. The letters of hypothecation were signed by the managing director as such; and Harvey, Brand & Co. had a right to assume that he had authority to sign them. There was, therefore, a complete hypothecation; and on this point also the decision of the Court below must be reversed.

Solicitors: *Waterhouse, Winterbotham & Co.; Morgan & Upjohn.*

H. C. J.

C. A.  
1896  
BIGGERSTAFF  
r.  
ROWATT'S  
WHARF.  
LIMITED.  
HOWARD  
r.  
ROWATT'S  
WHARF.  
LIMITED.

*In re* BAYLIS.

[1895 B. 172.]

*Solicitor—Costs—Taxation—Delivery of Bill—Retainer—Payment—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 37, 41—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8.*

C. A.  
1896  
CHITTY J.  
March 10, 11,  
18.  
C. A.  
April 22.

*Held* (affirming the decision of Chitty J.), that retainer by a solicitor of a sum for costs is not payment of his bill within the meaning of the Solicitors Act, 1843, and does not affect the right to taxation, although the sums from time to time retained for costs have been entered in accounts settled and approved by the client:

*Held*, further, that where a verbal agreement had been made that the solicitor should be paid for his costs in obtaining loans a certain percentage on the amounts borrowed, such expressions as "costs as agreed," designating the sums charged in the accounts for costs, which accounts were settled and signed by the client, were referable to the verbal agreement, and could not, as in *In re Trape* ([1893] 2 Ch. 284), be construed as meaning "costs which are hereby agreed at the amount of," and that there was, therefore, no written agreement signed by the client entitling the solicitor to those sums as his remuneration:

*Held*, further, that the delivery of the bills of costs under the order of the Court would not make the retainer amount to payment within the principle of *Ex parte Hemming* (28 L. T. (O.S.) 144), *In re Thompson* ([1894] 1 Q. B. 462; 63 L. J. (Q.B.) 187), and *Hitchcock v. Stretton* ([1892] 2 Ch. 343).

SUMMONS for delivery and taxation of a solicitor's bill of costs.

The applicant, Edmund Buckley, came of age in 1882, at which time he was an undergraduate resident at Oxford, and shortly afterwards employed Mr. Baylis as his solicitor, principally in obtaining loans for him. Mr. Baylis deposed as follows:

"It was very difficult to procure money for Mr. Buckley, as

C. A.  
1896  
*In re*  
BAYLIS.

he had no deeds or documents to shew his title or legal position ; he had no money to pay interest on money borrowed or premiums on insurance policies ; and from a very early period I told him that I could not and would not undertake to negotiate loans for him on the ordinary scale charges of a solicitor, and that for the special efforts that would be required, if I acted for him, I should charge a special percentage of 5*l.* per cent. on money procured, to cover my remuneration, in addition to professional charges in other matters in which I acted for him ; and that it would not be a case in which I could act if I had to deliver ordinary bills of costs. I have very special facilities for obtaining loans on incumbered estates at very reasonable rates of interest, and it is my custom in such cases to arrange an agreed percentage. This I repeated to Mr. Buckley many times, and he thoroughly understood it and agreed to it ; and, as appears hereafter, such an agreement was acted upon in all our dealings for years with Mr. Buckley's full knowledge and concurrence."

When a loan was effected a short account was drawn up and a receipt for the balance signed by Buckley at the foot. The following is a copy of one of these documents :—

" Mr. T. W. Baylis in account with Edmund Buckley, Esq.

| 1886                             | £    | s. | 1886                      | £    | s. |
|----------------------------------|------|----|---------------------------|------|----|
| Feb. Cheque Mr. Whately.         |      |    | Feb. Mr. Baylis. Costs of |      |    |
| Proceeds of mortgage for         |      |    | mortgage as agreed .      | 35   | 0  |
| 700 <i>l.</i> less his costs and |      |    | Do. Expenses of journeys  |      |    |
| interest and premiums            |      |    | to Holt from London       |      |    |
| on policy                        |      |    | and back . . . .          | 4    | 10 |
|                                  |      |    | Cheque this day. Balance  |      |    |
|                                  |      |    | to Mr. Edmund Buckley     | 490  | 2  |
|                                  |      |    |                           |      |    |
|                                  | £529 | 12 |                           | £529 | 12 |

" Examined and approved and received the above balance.  
February 24, 1886.

" 490*l.* 2*s.*

Edmund Buckley."

The other documents were of a similar character. In each of them Mr. Buckley signified his approval of the account, and the entries as to costs were usually "costs as agreed," or

"agreed costs," or something of the same kind, though a statement that the costs were agreed did not always occur against the deduction of costs. In one case in 1890 the memorandum at the foot was: "I have perused and approved and agreed to this account, which is correct, and received the above balance. E. Buckley."

On March 13, 1890, Buckley wrote to Mr. Baylis: "In the case of the death of either of us, as you have had the management of my affairs, I write to say that you have always furnished me with full and proper explanations relating to all mortgages I have given from the time when you were first concerned for me, and you have also properly accounted to me for all moneys passing through your hands, and have paid the same over to me at the time, and that there are now no outstanding accounts whatever between us."

No bills of costs had ever been delivered.

In 1894 Mr. Buckley changed his solicitors, and retained those employed by his father. There appeared to be some ground for supposing that the father influenced the son against Mr. Baylis, and that but for this influence the present proceedings would not have been taken. Ultimately, on January 11, 1895, Mr. Buckley took out an originating summons for an order on Mr. Baylis to deliver his bill of costs, and to have it referred for taxation.

The summons came on for hearing before Chitty J. on March 10, 1896.

*Farwell, Q.C.*, and *Sington*, for the applicant. We are entitled to the delivery of a bill of costs. Retainer is not payment unless a bill has been delivered: *In re Street* (1); *In re Stogdon* (2); *In re West, King and Adams* (3); *In re Frape*. (4)

*Scrutton*, for Baylis. The cash accounts are settled accounts, and retainer of costs coupled with settled accounts is payment within s. 41 of the Solicitors Act, 1843: *In re Bignold* (5);

(1) L. R. 10 Eq. 165.  
(2) 56 L. J. (Ch.) 420.

(3) [1892] 2 Q. B. 102.  
(4) [1893] 2 Ch. 284.

(5) 9 Beav. 269.

C. A. *Turner v. Hand* (1); *Re David* (2); *Ex parte Hemming* (3);  
 1896 *In re Thompson*. (4)

*In re*  
 BAYLIS.  
 The cash accounts amount to agreements within s. 8 of the Solicitors' Remuneration Act, 1881. The bill having been paid more than a year ago, the Court has no jurisdiction to refer it to taxation; and delivery of a bill cannot be ordered unless it is to be taxed when delivered.

If a bill were now delivered the previous payments would be referable thereto: *Hitchcock v. Stretton* (5). *In re Street* (6) was criticised in *In re Hall and Barker*. (7)

*Farwell, Q.C.*, in reply. With regard to the case of *In re Thompson* (4), it appears from the report of that case in the *Law Journal* (8) that a proper bill of costs had been delivered. The Court has power to order the delivery of a bill whether or not it is one which it would have jurisdiction to refer to taxation: *Duffett v. McEvoy*. (9)

CHITTY J. This is an application by a client for the delivery of formal bills of costs by his solicitor, and for taxation of those bills. The solicitor acted for the client from 1883 to 1894—a period of ten or eleven years. The application was made in January, 1895. It cannot be questioned on the facts that no bill of costs was ever delivered. By "bill of costs" I mean what the Solicitors Act, 1843, says, namely, a bill of fees, charges, and disbursements. I entirely dissent from the argument that there are two kinds of solicitors' bills. There is only one, as is shewn by numerous authorities. In the present case accounts have from time to time been made out by the solicitor and delivered to the client. If these accounts had been between a tradesman and his customer they might, as to many of them, be properly taken to be settled accounts. I need hardly go into the question of what is a settled account. The common law called it an account stated. An account may be stated between ordinary persons, and where items on both sides are shewn the

(1) 27 Beav. 561.

(2) 30 Beav. 278.

(3) 28 L. T. (O.S.) 144.

(4) [1894] 1 Q. B. 462.

(5) [1892] 2 Ch. 343.

(6) L. R. 10 Eq. 165.

(7) 9 Ch. D. 538.

(8) 63 L. J. (Q.B.) 187.

(9) 10 App. Cas. 300.



statement may, and generally does, result in a payment at law. I mean that it results not only in payment of the balance actually paid, but in payment of the whole account. It is argued that the same principle applies as between solicitor and client, namely, that a settled account amounts to payment of a bill. I decline to travel over the cases for the third or fourth time. In *In re Stogdon* (1) I expressed my opinion on *In re Street*. (2) Counsel for Mr. Baylis has pointed out that Jessel M.R., in *In re Hall and Barker* (3), made some observations on *In re Street* (2); but those observations were not made with reference to the question of payment where no bill had been delivered, but to another part of the case, namely, whether the bills were to be treated as one continuous bill or separate bills. I expressed my opinion as to the true explanation of *Ex parte Hemming* (4) in *In re Stogdon* (1), and Stirling J. in *Hitchcock v. Stretton* (5) has adopted my explanation. A proper bill was substantially delivered in *Ex parte Hemming*. (4) There is no authority for the proposition that a mere settled account, where no proper bill has been delivered in the true sense of the term "bill," is payment within the Solicitors Act, 1843. Since the Act of 1881 there may be a good bill delivered in particular cases, as, for instance, where the scale applies, the bill merely stating one scale item. There may also be a good bill within the Act of 1881 referring "to costs as agreed." In considering that statute I am brought face to face with the enactment in s. 8, that the bill delivered is not conclusive against the client. The agreement is one of which the fairness and reasonableness may be questioned. Lindley L.J., in *In re Frape* (6), observed that it was impossible to decide whether the agreement was unfair or unreasonable without taxation. I add that it is impossible to say anything at all upon the subject until a proper bill for fees, costs, and disbursements has been delivered to the client. Till then neither the Court nor the client is in a position to say whether the agreement is fair or the charges reasonable. There is nothing to prevent a person who is sui juris settling an

C. A.  
1896  
~~~~~  
In re
BAYLIS.
~~~~~  
Chitty J.

(1) 56 L. J. (Ch.) 420.

(2) L. R. 10 Eq. 165.

(3) 9 Ch. D. 546.

(4) 28 L. T. (O.S.) 144.

(5) [1892] 2 Ch. 343.

(6) [1893] 2 Ch. 284.

C. A.  
1896  
*In re*  
BAYLIS.  
Chitty J.

account if he likes after a proper bill has been delivered. It was argued that I had no jurisdiction to order a bill to be delivered unless I could also order taxation, and, further, that there could be no taxation where there had been payment. I reply that here there has been no payment of any bill. Many of the so-called accounts in this case merely contain the words "costs," "agreed costs," or "on account of costs." The question of jurisdiction falls to the ground, and cannot be maintained as a general proposition. In the case of *Duffett v. McEvoy* (1) the judgment turned on a Colonial statute, but it was founded on an examination of the meaning of s. 37 of the Solicitors Act, 1843, and shewed that the Colonial Act was the same as the English Act, the lengthy s. 37 being split up into several sections. In regard to the English Act, Lord Blackburn said, speaking of this 37th section (2): "The Courts and judges in the same cases in which they are respectively authorized to refer a bill which has been delivered, may order a bill to be delivered. That, however, when it is looked to, does not mean to say that no bill shall be ordered to be delivered until it is ascertained that the bill itself is proper to be submitted to taxation." Then he says: "If there had never been any bill at all,"—and this is most important on another part of Mr. Scrutton's argument—"which seems to have been the case here, that is to say, nothing that would give any details or items, or enable the party to judge of the goodness of the items, the bill may be ordered to be delivered, it not necessarily following that then it would be ordered to be taxed, the object of ordering the delivery of a bill being to see whether there are such special circumstances as would cause it to be taxed." The result of that case, which I readily follow, is, that there is power to order the delivery of a bill whether or not it has been paid—to use the language of the head-note—or whether or not it is one which the Court would have jurisdiction to refer to taxation. Now the solicitor does in this case set up an agreement. The agreement, on his evidence, is an oral one, and, stating it shortly, it is that with regard to the loan and the business connected therewith, which seems to have been to raise money for his client, he was to have a

(1) 10 App. Cas. 300.

(2) 10 App. Cas. 301, 302.

uniform charge of 5 per cent. on the amount. That, being an oral agreement, is not within the statute of 1881. But among the documents which I have called generally, without meaning to express my opinion on every one of them, settled accounts, which are no less than fourteen in number, there are here and there references to "agreed costs"; and Mr. Scrutton has argued that, by examining the amounts that are charged for costs in these documents, it can be ascertained that the charge was in many cases, if not in all, the 5 per cent. in reference to that portion of the business. I am not sure that that is made out; but I do not propose to prejudice in any way that question. Treating the amount charged for costs as costs in relation merely to the raising of money for his client, there is a notable difference between the total amount charged and the total amount which would be payable according to the scale which was in operation when these transactions began. I have a tabular statement, which is deposed to, which shews the total amounts deducted—for they were deducted by the solicitor during the course of this business—were 3278*l.*; whereas the scale fee would be 589*l.*, leaving a difference in favour of the solicitor of 2600*l.* and more. But this tabular statement does not really exhaust the matter. The solicitor did transact other business besides the raising of the loans; and in regard to those matters the solicitor does not allege an oral agreement. I do not intend to express a final opinion in regard to that 5 per cent. charge on the raising of the money. The 5 per cent., having regard to the sum raised, is in several cases largely in excess of the scale fee. There were costs outside these loan transactions. It may be that the solicitor can justify, to a considerable extent, the charge he has made; but, speaking of the loan transactions themselves, I think, having regard to the scale, there is a *prima facie* case for saying that there has been overcharge, and a serious overcharge in respect at least of some of the loan transactions. The earlier loan transactions were raising money for the applicant whilst at Oxford after he had attained twenty-one, and the later ones were for the purpose of paying off the former loans. The total sums were very considerable, though they did not result in money going into the pocket of the applicant, but

C. A.

1896

*In re*  
BAYLIS.

Chitty J.

C. A.  
1896  
*In re*  
BAYLIS.  
*Chitty J.*

went to pay off the former incumbrances. As to the reasonableness and fairness of the agreement, it must be borne in mind that the applicant was in a position to give, and did give, security. The solicitor did get the money, and he got it on reasonable terms as to interest. There is no ground for saying—and in fact the applicant's counsel has never said—that there was any charge of fraud against the solicitor. I think I have gone through the principal matters now. I might mention one authority which at first sight did seem to give countenance to a portion of Mr. Scrutton's argument, namely, that there could be payment of a solicitor's bill where no bill was delivered, but merely an account sent in in general terms without items. That is the case of *In re Thompson*. (1) The judgment in the case spoke of the delivery of a bill of costs, and from the report of the facts in the LAW REPORTS it was not easy to make out what the judges were referring to, for both of them, Pollock B. and Charles J., spoke of it as a delivered bill of costs. It appears that there is some omission in that report; because I find in the report of the same case in the *Law Journal* (2) there was a bill of costs first ordered to be delivered, and, secondly, delivered in pursuance of the order. By some slip that bill of costs is not mentioned in the LAW REPORTS; and, consequently, Mr. Scrutton was able to present to the Court the argument that a cash account delivered by the solicitor to the client was a bill of costs according to that decision.

Something was urged by Mr. Scrutton in Mr. Baylis's favour on the ground of lapse of time. It was admitted by him, rightly, that no Statute of Limitations would apply; but he appealed to the discretion of the Court not to order the bills to be delivered—bills which run back to the year 1883. I think there is a discretion, and that the Court ought to have regard to the circumstances; but I find on the correspondence (and I say this notwithstanding what has fallen from Mr. Baylis himself) that Mr. Baylis has been ready to deliver a bill, and has got all the materials to deliver a bill, and in fact, I think, I am not going too far in saying that he has prepared the bills; so that I am not putting upon him a task which it would be

(1) [1894] 1 Q. B. 462.

(2) 63 L. J. (Q.B.) 187.



very difficult for him to perform by reason of the years that have elapsed. I think I have gone through at sufficient length all the points of the case. I think there is jurisdiction to order a bill to be delivered, and that, as no bill has been delivered, I ought to order the delivery of the bill. I think on the authorities there has been no payment for the reasons I have already mentioned; and therefore I am not concerned with the section which precludes orders being made for taxation one year after payment. I think, also, I have jurisdiction to make the order I propose to make within the statute; and I think that, though the solicitor may be able to shew before the taxing master that some of the written agreements within the decision of *In re Frape* (1) are fair and reasonable, yet there is such a case with regard to them as in the absence of detailed bills justifies me in giving a direction to the taxing master to inquire into the subject.

G. M.

[An order was made directing that Mr. Baylis should deliver to the applicant, Edmund Buckley, a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he had been employed as the solicitor for the applicant, and that it should be referred to the taxing master to tax and settle the said bill. The usual directions were given as to production of books, papers, and writings, and as to the examination of the parties: "And it is ordered that the respondent do give credit for all sums of money by him received of or on account of the applicant, and that he be at liberty to charge all sums of money paid by him to or on account of the applicant. And the taxing master is to inquire whether any and what special agreement has been entered into between the applicant and the respondent within the Solicitors' Remuneration Act, 1881, and if so, whether any and which of such agreements are or are not fair and reasonable."]

Mr. Baylis appealed. The appeal was heard on April 22, 1896.

*Scrutton*, for the appeal. First, we have here a series of settled accounts signed and approved by a man competent to

(1) [1893] 2 Ch. 284.

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1

C. A.

1896

*In re*

BAYLIS.

Chitty J.

C. A.  
1896  
In re  
BAYLIS.

transact business, and the Court will require a strong case to open them. There was a general verbal agreement that 5*l.* per cent. on the loans should be charged as remuneration to the solicitor, and the separate settled accounts, each amounting to a distinct agreement, proceed on that footing. In *In re Frape* (1) the entry "agreed costs 80*l.*" in an account signed by the client, was held by the Court of Appeal to be an agreement within the Act of 1881. So I say that here, taking as an instance the account of February, 1886, containing the entry "costs of mortgage as agreed, 35*l.*," is an agreement in writing by the client to pay 35*l.* costs in respect of this one loan. And why should the transaction be opened after nine years? Secondly, I say that there was payment within the Act of 1843. Lord Romilly has defined "payment" in *Re David* (2) as being "a payment of the money or a retainer of the amount by the solicitor with the assent of the client." In *Turner v. Hand* (3) no bill had been delivered, but only a series of estimates as to what the costs would amount to. The client signed a memorandum agreeing to the amount, and paid it. A bill to have a bill of costs delivered was dismissed. According to *Ex parte Hemming* (4) and *In re Thompson* (5), retention by the solicitor and subsequent delivery of the bill is payment.

[LINDLEY L.J. Surely that proceeds on the ground that the client, having had an opportunity to examine the bill, assented to the retainer.]

In *Hitchcock v. Stretton* (6) the bill was delivered after writ issued, and the ground cannot be that the client had examined the bills and assented to the retainer. When the bills are delivered under this order there will then have been retainer and delivery of a bill, which together amount to payment, and the bills will not be taxable unless under special circumstances. It is also most unreasonable that there should be delivery of a bill and taxation after this lapse of years.

(1) [1893] 2 Ch. 284.

(2) 30 Beav. 278.

(3) 27 Beav. 561.

(4) 28 L. T. (O.S.) 144.

(5) [1894] 1 Q. B. 462; 63 L. J.

(Q.B.) 187.

(6) [1892] 2 Ch. 343.

*Farwell, Q.C.*, and *Sington*, for the client, were not called upon.

C. A.

1896

*In re*BAYLIS.

LINDLEY L.J. I am of opinion that the order of Chitty J. is quite correct.

The client attained the age of twenty-one years in 1882. In 1883 he sought the assistance of Mr. Baylis in various matters, and particularly in obtaining loans. When a loan was obtained Mr. Baylis never delivered any bill of costs, but gave an account which was settled by the client, and this went on for some years. In 1894 the client changed his solicitor. The evidence appears to shew that the present proceedings would not have been taken but for some unpleasantness between the client's father and Mr. Baylis; but it does not make out the case that the father is taking proceedings in the son's name—there is no doubt that these are *bonâ fide* the son's proceedings.

Several points were made on behalf of Mr. Baylis. First, that there were settled accounts, and that the bills were paid. The two things go together. We cannot hold that the accounts were settled and the bills paid, as no bills had ever been delivered. Mr. Scrutton tried to persuade us that when the bills are delivered under the order of the Court there will have been payment and delivery of bills, and that the bills will have to be treated as paid bills; but I cannot accede to this. The case is not like *Hitchcock v. Stretton* (1), where Stirling J. went a long way in holding that a delivery of the bill after writ issued was sufficient. I think he was very much influenced by this, that on looking at the bill when delivered he found it to be a reasonable bill.

It was contended that *Ex parte Hemming* (2) and *In re Thompson* (3) shew that the delivery of a bill to which a previous payment can be referred makes the transaction amount to payment of the bill; but in my opinion the Court in those cases thought that the client had had the bill and exercised his judgment upon it. A solicitor who retains his costs without delivering his bill has not been paid his bill.

(1) [1892] 2 Ch. 343.

(2) 28 L. T. (O.S.) 144.

(3) [1894] 1 Q. B. 462; 63 L. J. (Q.B.) 187.

G. A.

1896

*In re*

BAYLIS.

Lindley L.J.

The next case made is that there was an agreement which precluded taxation. If there had been an agreement in writing as to the amount to be paid to the solicitor for his services that would have satisfied the Act of 1870 (33 & 34 Vict. c. 28), s. 4. It appears, however, that there was only a verbal agreement. Having before us the fact that there was such an agreement we cannot construe the words "costs as agreed" in the way in which they were construed in *In re Frape* (1), for they naturally refer to an antecedent agreement, and when there is such an agreement, though not in writing, we must treat them as referring to it. I think that *In re Frape* (1) was rightly decided, but that it does not cover the present case.

It was urged that the long delay precluded the client from relief. If I had thought that Mr. Baylis was disabled by the lapse of time from making out a bill of costs, I should have held the delay to be very important; but he admits that he can furnish a bill of costs.

The charges for costs in the accounts are very high—much larger than the scale fees. I do not say that there is overcharge, but there is certainly a case calling for investigation.

LOPES L.J. I am of the same opinion. One point urged on behalf of the solicitor is delay. Nearly twelve years elapsed since the commencement of these transactions, during which period no complaint was made, and if it did not appear from the evidence that Mr. Baylis can easily prepare a bill of costs I might have thought this objection fatal. As, however, Mr. Baylis can readily furnish a bill, I do not think that the delay is very important. There is moreover ground for thinking an agreement for such a scale of remuneration as that claimed by Mr. Baylis unreasonable, for the charges greatly exceed the scale charges, a strong argument against him.

No bill having been delivered, the retainer by the solicitor is not payment within the meaning of the Act. But it is contended that if bills are now delivered there will be payment. In the case of *Hitchcock v. Stretton* (2) the delivery of a bill of costs after writ issued was held to make a previous retainer in

(1) [1893] 2 Ch. 284.

(2) [1892] 2 Ch. 343.



settling accounts amount to payment; but Stirling J. acted as he did because, on looking at the bill, he thought the transaction fair and right.

Sect. 8 of the Solicitors' Remuneration Act of 1881 provides that a solicitor may make an agreement with his client, or a client with his solicitor, for the remuneration of the solicitor to such amount and in such manner as the solicitor and client think fit; and by sub-s. 2 it is enacted that the agreement shall be in writing, signed by the person to be bound thereby or his agent in that behalf. Was there here any such agreement? The words "costs as agreed" in the cash accounts do not satisfy that provision. I think that the statute meant that the terms of remuneration should be expressed in the agreement. The words "agreed costs" are in themselves ambiguous. They may mean costs hereby agreed or costs as fixed by some previous agreement. We are here candidly told that there was a verbal agreement fixing the scale of remuneration at 5*l.* per cent. on the sums borrowed. Knowing that, we cannot say that "agreed costs" means costs hereby agreed. I think that Chitty J. was right.

KAY L.J. In any case of an agreement between solicitor and client the Court must consider the great influence which a solicitor has over his client, and if the agreement is impeached it must throw on the solicitor the burden of sustaining it. The Act of 1881 recognises that by enabling the taxing master to inquire whether an agreement relied on by a solicitor is fair and reasonable. Is there here any agreement which can bind the client? There is nothing signed by him except certain accounts containing items prefaced by "costs as agreed" or some similar expression. Mr. Scrutton says that these are agreements. But he opened the case with stating that there was a verbal agreement—a verbal agreement for remuneration at the rate of 5*l.* per cent. It would, perhaps, have been difficult for the other side to give this kind of evidence; but when the solicitor himself says that this was the real agreement, there can be no doubt that the accounts referred to it, and "as agreed" must be read as referring to the verbal agreement, which, not being in writing, does not bind. It is urged that

C. A.

1896

*In re*  
BAYLIS.Lopes L.J.  

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C. A.  
1896  
*In re*  
BAYLIS.  
Kay L.J.

this does not agree with *In re Frape*. (1) In that case an account contained the expression "agreed costs, 80*l*," and the Court said that this must mean "all costs up to the present time which it is hereby agreed shall be taken at the amount of 80*l*," but there was in that case no trace of any external agreement.

Again, this agreement was obtained by the solicitor from his client shortly after he attained twenty-one, and if it had been in writing it would have been open to question whether it was fair and reasonable. There are matters which require investigation. In the account relating to the first loan no reference is made to any agreement; but the costs charged enormously exceed the amount of the scale fee. It is urged that there has been payment. But is there any case in which, if no bill has been delivered, retainer has been held to amount to payment? No such case has been referred to; but it is contended that when a bill has been delivered soon afterwards the retainer amounts to payment. *Hitchcock v. Stretton* (2) went a little further, and decided that the delivery of a bill after writ issued would suffice. I should not so have decided; but we are asked to go a step further, and say that when the bills are delivered under an order of the Court that delivery will relate back. I cannot assent to the argument that delivery of the bills under this order will make that amount to payment which up to their delivery was not payment.

It is urged that the application is made too late. There is no Statute of Limitations bearing on the point, and the Acts relating to solicitors say nothing as to a time after which a client cannot require delivery of a bill. If the case had been established that the solicitor would have difficulty in making out a bill of costs after this lapse of time, that would have been an important point; but the solicitor himself says that he has made out a draft bill, so that no such weight ought to be given to the delay as to induce us to say that the order under appeal is wrong. I think that it is a reasonable, proper, and right order.

Solicitors: *Peard & Son; Rowcliffes, Rawle & Co., for A. & G. W. Fox, Manchester.*

(1) [1893] 2 Ch. 284.

(2) [1892] 2 Ch. 343.

*In re* HEMP, YARN, AND CORDAGE COMPANY.

## HINDLEY'S CASE.

*Company—Winding-up—Contributory—Underwriting Letter.*

C. A.

1895

VAUGHAN  
WILLIAMS  
J.

Nov. 27, 28.

1896

Feb. 19.

C. A.

May 1.  
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On June 17, 1892, H. signed and delivered to the promoters of a company a letter agreeing that upon the public issue of its shares he would, in consideration of a percentage, subscribe for 400 shares. If the whole issue was bonâ fide subscribed for by the public, no allotment was to be made to H. The letter also contained an authority to the promoters, in the event of H. not applying for shares, to apply for them in his name, and an authority to the directors to allot them to him—"This engagement is binding on me for two months from this date." The shares were offered to the public on June 20, 21, and 22, but very few applications were made. On July 1, when the public subscription list was closed, the promoters signed a memorandum at the foot of the letter, dated July 1, 1892, and accepting H.'s offer. The letter with the memorandum thereon and an application by the promoters in H.'s name were on the same day sent to the company, and the shares were thereupon allotted to H. His name was put on the register of shareholders. He knew of this, and he paid the company the allotment money in respect of the shares, received his certificates, and on two occasions voted by proxy; but it was not shewn that he knew when the offer was accepted. The name was still on the register when the company went into liquidation nearly two years afterwards:—

*Held*, by Vaughan Williams J., that the promoters could not wait to see the result of the invitation to the public, and after it had failed, accept H.'s offer, and that he was not liable as a contributory:

*Held*, by Lopes and Kay L.JJ. (Lindley L.J. doubting), that the expression "This engagement is binding on me for two months" meant that the offer made by the letter was to be open for acceptance for two months; that the shares, therefore, were properly applied for in H.'s name, and that the allotment to him was valid:

*Held*, that, whether the application for shares was authorized or not, H., having accepted them without inquiry, and having acted as a shareholder for nearly two years up to the time of the winding-up, could not now be heard to contend that he was not a shareholder.

THE Hemp, Yarn, and Cordage Company, Limited, was registered under the Companies Acts, 1862 to 1890, on June 16, 1892, and its nominal capital was in preference and ordinary shares of 5*l.* each.

The company invited the public to subscribe for 24,000 ordinary shares, 20,000 preference shares, and some debentures.

C. A.  
1896  
HINDLEY'S  
CASE.

The London and Northern Assets Corporation, Limited, was connected with the promotion of the company, and several persons, among whom was W. H. Hindley, addressed and sent underwriting letters to the corporation.

The letter signed by Hindley was dated June 17, 1892. It was headed with the name of the company and a statement of the amount of the proposed issue of shares and debentures, and was formed by filling up a printed form relating to ordinary shares, preference shares and debentures, and was addressed to the London and Northern Assets Corporation, after which address the letter (omitting the parts relating to preference shares and debentures) continued as follows: "Gentlemen,—I agree for the consideration below stated, upon the public issue, to subscribe for 400 ordinary shares of 5*l.* each, 1*l.* 5*s.* paid, of the above issue, on the terms of the company's prospectus about to be issued, and to pay the instalments on the dates to be specified in the said prospectus as above, in consideration of which you are to pay me a commission of 1 per cent. on the ordinary shares, and I hereby authorize you, in the event of my not applying for shares as above mentioned, to apply for such shares in my name, and the directors of the company to allot the same to me thereon. But if, on the public issue of the prospectus, the whole of the above issue is *bonâ fide* subscribed by the public, then no allotment is to be made to me in respect of this agreement; but should the said issue be only partially subscribed by the public, then I am only to be allotted my proportion of the deficiency *pro ratâ* with the other persons or firms who shall have signed or entered into agreements with or underwriting letters to you similar, *mutatis mutandis*, to the arrangement hereby made. In either case it is agreed that the said commission upon the total sum guaranteed by me—*viz.*, 2000*l.*—is to be paid out of the moneys received by you from the vendors. This engagement is binding on me for two months from this date."

At the foot of the letter was the following note: "We accept the above. For the London and Northern Assets Corporation, Limited. (Signed) J. M. Prinsep. Dated July 1st, 1892."

The prospectus announcing the issue of shares stated, "The



list will open on Monday the 20th inst. and close on or before Wednesday the 22nd inst. at noon." Accordingly, on June 20, 21, and 22, 1892, the capital was offered to the public; but the issue was a failure, only nine applications having been made.

C. A.  
1896  
HINDLEY'S  
CASE.

On July 1, after the subscription list had been closed, an application was made to the company for 400 ordinary shares to be allotted to Hindley. The application form was not signed by him personally, but was signed in his name. The underwriting letter with the memorandum of acceptance on it was produced to the directors before allotment. The shares applied for were allotted to Hindley. He paid the 1*l.* 5*s.* due in respect of them, and his name was entered in the register of members of the company as the holder of the shares. He knew his name was on the register, but never took any steps to have it removed, and it was still there when the company went into liquidation.

On May 21, 1894, the company passed an extraordinary resolution in favour of winding up voluntarily; and on June 14, 1894, an order was made continuing the voluntary winding-up under the supervision of the Court.

The liquidator made a call on the shares of 3*l.* 15*s.* per share, and took out a summons asking for an order that Hindley and others should pay the call.

The summons came on for hearing before Vaughan Williams J. on November 27, 1895.

*Buckley, Q.C.*, and *W. F. Hamilton*, for the liquidator. The corporation, in pursuance of the authority given them by the underwriting letter, applied for the shares in the name of Hindley. In answer to the application the shares were allotted to him, and he was registered as the holder of them. He knew his name was on the register, and there was a completed contract to take the shares. He is, therefore, liable to pay the call.

*Astbury, Q.C.*, and *E. C. Macnaghten*, for Hindley. The underwriting letter was a mere offer, and there was no contract between Hindley and any one else before the offer was thus accepted. The corporation could not keep its acceptance

C. A.  
1896  
HINDLEY'S  
CASE.

open indefinitely. It was not entitled to wait and see whether the public would take up the shares, in the meantime being by non-acceptance under no liability to pay Hindley the commission, and then, on finding the public would have nothing to do with the shares, to pin down Hindley by accepting his offer. If Hindley had intended to take the shares in any event, there was no need to mention the public in his offer. At the most, he consented to apply on certain conditions the non-fulfilment of which rendered his offer nugatory : *Pellatt's Case* (1), *Dougan's Case* (2) ; *Re Bentley & Co.* (3) ; *Ormerod's Case.* (4)

The corporation's acceptance, therefore, comes too late ; the so-called contract was a nullity, and the corporation had no authority to apply for the shares.

It may be contended that in what afterwards occurred there was a ratification of the contract by Hindley ; but he could not ratify or adopt anything of the existence of which he was unaware. He did not know that the acceptance had been made too late, though the company must have known of the fact. Under the circumstances Hindley cannot be held to have applied, by himself or his agents, for the shares, and there never was a contract between him and the company. If so, the mechanical act of putting his name on the register cannot affect his position.

[They also referred to *Black & Co.'s Case* (5) ; *Brussels Palace of Varieties v. Prockter* (6) ; Buckley on Companies, 6th ed. p. 65.]

*Hamilton*, in reply. There is no evidence that the company ever saw the underwriting letter or the acceptance on it. The respondent authorized the corporation to apply for the shares, and the company to allot them. He afterwards accepted the shares, and has ratified the contract. After winding-up, his name being on the register, it is too late for him to apply to have it removed : *Oakes v. Turquand.* (7) Apart from ratification, when the company issues shares and the allottee accepts

(1) L. R. 2 Ch. 527.

(4) [1894] 2 Ch. 474.

(2) L. R. 8 Ch. 540.

(5) L. R. 8 Ch. 254, 259.

(3) 69 L. T. (N.S.) 204.

(6) 10 Times L. R. 72.

(7) L. R. 2 H. L. 325.

them, he is bound, after winding-up, although he applied under circumstances which in equity would have given him an equity before winding-up to be relieved of liability: *Kent v. Freehold Land and Brickmaking Co.* (1)

C. A.  
1896  
HINDLEY'S  
CASE.

Feb. 19. VAUGHAN WILLIAMS J. I have come to the conclusion that Mr. Hindley ought not to be placed upon the list of contributories. It is true that his name appears upon the register of shareholders, and that it was placed there in respect of shares allotted to him in pursuance of an application signed in his name, under a power contained in an underwriting letter which he himself signed, and which is addressed to the London and Northern Assets Corporation, who seem to have been intimately connected with the promotion of the Hemp, Yarn, and Cordage Company. But it seems to me that, notwithstanding these facts, Mr. Hindley ought not to be placed on the list of contributories, because the London and Northern Assets Corporation had no right to use the powers under the underwriting letter at the time when they actually did use them. The underwriting letter, which is in substance an offer, is dated June 17, 1892. The capital of the company was offered to the public on June 20, 21, and 22, and the offer contained in the letter was not accepted until July 1, 1892, as appears upon the face of the letter, which has the acceptance and date of acceptance written on it. On July 1 the subscription list had been closed, the invitation to the public proving an almost total failure, only nine applications having been made. Now it seems clear that as the offer in the underwriting letter is an offer, in consideration of a premium, to take up such shares as the public should not take up in answer to the invitation for public subscription, the Northern Assets Corporation, to whom it was addressed, could not wait to see the result of the invitation to the public, and then accept Mr. Hindley's offer to underwrite after the invitation to the public had proved a failure. If there was no authority to sign the application for shares at the time when it was signed, then it seems to me that there was no contract between Mr. Hindley and the

C. A.  
1896  
HINDLEY'S  
CASE.  
Vaughan  
Williams J.

company in pursuance of which shares could be allotted to him ; and the mere fact of his name being on the register, even though with his knowledge, will not make him a member. But, then, it may be said that Mr. Hindley ratified the act of his assumed agent by not taking steps to get his name removed from the register, and that he cannot after liquidation get his name removed from the register. The answer to this seems to be that the underwriting letter was produced to the board before the allotment, and on the face of it shewed that the offer had been accepted out of time. This is not a case in which there was a voidable contract by Mr. Hindley with the company to take shares, or a voidable authority to apply. In such a case, liquidation having intervened, it would be too late to avoid, but it is a case where there never was an authority to sign or a contract by Hindley with the company, and where there never has been ratification with knowledge of the facts ; and the company cannot rely upon an estoppel, because they were wrong in allotting shares in pursuance of the authority produced to them, which, on the face of it, was out of time. As against Mr. Hindley, therefore, the application must be dismissed with costs.

F. E.

C. A. The liquidator appealed, and on the appeal evidence was adduced that on January 23, 1893, Hindley applied for and received certificates of the shares, and that in May, 1893, he signed proxy papers as a shareholder, and did so again in the following year.

The appeal was heard on May 1, 1896.

*Buckley, Q.C.* (*W. F. Hamilton*, with him) having stated the case, was stopped by the Court.

*Astbury, Q.C.*, and *E. C. Macnaghten*, for Hindley. It was a fraud in the Northern Assets Corporation to wait till it was seen that the company would not take shares and then accept Hindley's offer.

[*LOPES L.J.* referred to *Ex parte Audain* (1) as giving a definition of an underwriting agreement.]



Hindley's letter was nothing but an offer—an offer to incur a certain risk on a certain chance; and to make a contract it must be accepted before the chance has been converted into a certainty. The acceptance coming when it did was invalid: it was like accepting an offer to back a horse after the person accepting knows that the horse has lost. There was, therefore, no authority to apply for shares in Hindley's name.

[THE COURT here intimated an opinion that the letter meant that the offer made by it was open for two months, and that there therefore was authority.]

We submit that the meaning of "This engagement is binding on me for two months from this date" is that when the offer has been accepted the agreement thus constituted is to be binding on Hindley for two months from the date of the offer. "Engagement" denotes an agreement, not an offer. The terms of the letter are throughout applicable to an agreement, and presuppose acceptance. The prospectus was before the parties: they knew that the shares were to be offered to the public within a week; and it would be a most extraordinary thing that under those circumstances an underwriting offer should be made to remain open for two months. In construing a document which is not in form an offer but an agreement, regard must be had to its form. If the two months are construed as meaning the time within which the offer must be accepted, then, after acceptance, there is an agreement unlimited in point of time, and shares might be allotted to Hindley after a lapse of years. The application for shares was, therefore, made by a person who had no authority, and the Hemp Company knew that he had no authority. Hindley did not know that there was no contract between him and the Northern Assets Corporation, for he did not know that his offer had not been accepted till after the subscription list had been closed, and there cannot be ratification without knowledge. He is not to be deemed guilty of negligence for not making inquiry, as no one is bound to suspect that other people are dealing unfairly. There being, then, no authority to apply for shares on Hindley's behalf, the allotment to him was void, and he never became a shareholder. In *Beck's*

C. A.  
1896  
HINDLEY'S  
CASE.

C. A.  
1896  
HINDLEY'S  
CASE.

*Case* (1), where a person's name was put on the register of shareholders without any authority from him, as the letter of allotment introduced a new term, he was held not to be a contributory, though he had done no act of repudiation before the winding-up order, and had done acts of ratification quite as strong as any relied on here. The observations of Lord Hatherley and Lord Westbury in *Waterhouse v. Jamieson* (2) support our view. The contract being void, the alleged shareholder can have his name taken off, even after winding-up.

[LINDLEY L.J. If an agent has an ambiguously worded authority, and another person contracts *bonâ fide* on a particular construction of it, is there not a good contract?]

The Hemp Company do not tell us that they *bonâ fide* believed the letter to bear the construction rejected by Vaughan Williams J.

*Hamilton*, in reply. The argument of the other side proceeds on a fallacy. To make a contract there must be an acceptance of the offer and a communication of the acceptance. No acceptance of Hindley's offer had been communicated to him. He knew, therefore, that there was no contract. He was at liberty to repudiate the allotment, but instead of doing so he accepted it, and acted as a shareholder. This makes a new contract to be a shareholder. In Hindley's first letter there was an authority as well as an offer, and the authority to apply for shares is one on which the company were justified in acting: *Re Bentley & Co.* (3) As to whether the contract to take shares was void or voidable, *Bolton Partners v. Lambert* (4) shews that where an agent exceeds his authority a contract entered into by him is not void, but only voidable. It therefore can be ratified—and here there was abundant ratification.

*Astbury, Q.C.*, on the cases cited in reply. In the case of *Re Bentley & Co.* (3) there was a formal acceptance signed. *Bolton Partners v. Lambert* (4) does not shew that an act done without authority is not a nullity if the agency is never adopted.

(1) L. R. 9 Ch. 392.

(2) L. R. 2 H. L., Sc. 29, 33, 37.

(3) 69 L. T. (N.S.) 204.

(4) 41 Ch. D. 295.

LINDLEY L.J. This is an appeal from a decision of Vaughan Williams J., that Mr. Hindley is not liable to calls on 400 shares in the Hemp, Yarn, and Cordage Company, Limited, which is now being wound up. [His Lordship read Hindley's letter of June 17, 1892.] That is signed by Hindley. Of course when it was sent to the Northern Assets Corporation it was an offer, and an offer only. Although it begins "I agree," it could not be binding as an agreement unless it was accepted.

This was on a printed form, and at the bottom of that printed form is this: "We accept the above for the London and Northern Assets Corporation, Limited." Then there is a blank for the signature and a blank for the date. It was signed on behalf of the Assets Corporation, Limited, on July 1, 1892. Then, subject to one point which I shall mention presently, there was a binding agreement.

On the same July 1, 1892, an application for 400 shares is made in Mr. Hindley's name by the Northern Assets Corporation; and on the same day Mr. Hindley has 400 shares allotted to him, and he is put upon the register, and he is informed of that, and he pays 25s. a share, which was the amount payable on application and allotment. Those shares remain in his name until May, 1894, when a resolution was passed to wind up the company; so that Mr. Hindley was on the register as a registered shareholder for about a year and three-quarters. In June, 1894, an order was made for winding up the company, subject to supervision. The list of contributories appears to have been settled on May 28, 1895; and after that a call was made. Mr. Hindley declined to pay the call so made, and a summons was taken out to compel him to pay it. His answer is, "I am not and never was a shareholder." He says, "This underwriting letter which I signed involves upon the true construction of it the necessity of an acceptance by the London and Northern Assets Corporation within a reasonable time after I offered it; they in fact accepted it on July 1, 1892, which was an unreasonable time after they received my offer, and the directors of the Yarn Company knew that."

That is his case; and he asks us to say that upon that case there was no authority to put his name on the register, and

C. A.  
1896  
HINDLEY'S  
CASE.

C. A.  
1896  
HINDLEY'S  
CASE.  
Lindley L.J.

that he has been there improperly ever since. He says that the transaction having been altogether void, the mere fact that he had received certificates and acted as a shareholder goes for nothing.

Now, upon the true construction of this document Vaughan Williams J. has held that Mr. Hindley was right: that the document according to its true construction was not to come into force or be binding on him unless it was accepted within a reasonable time; that as it was accepted after June 22, which was the time for sending in subscriptions and for closing the list, the acceptance must be treated as wholly invalid, and that, as Mr. Hindley did not know that there never was any agreement by him to take these shares at all, his name ought not to be on the list. It is only just to say that we have received some evidence which was not before the learned judge: I mean evidence that on January 23, 1893, Mr. Hindley being then on the register and knowing it, applied for and received certificates that he was a member in respect to those shares; and evidence to the effect that in May, 1893, he signed some proxy papers, and did so again in the following year. So that we have this evidence in addition to that which was before Vaughan Williams J.—that this gentleman, knowing that he was registered as a shareholder, has been acting as such and asserting rights as such from July, 1892, down to very nearly the date of the end of the existence of this company.

Upon the true construction of the agreement I do not propose to say much. The construction of the words, "This engagement is binding on me for two months from this date," is open to a great deal of doubt. Mr. Buckley contends that they mean, "This offer is open for two months for rejection or acceptance." The other construction, which is contended for by Mr. Astbury, is that the two months do not refer to the time for acceptance of the offer, but to the duration of the engagement or agreement, which will become binding when the offer is accepted; and this view has been taken by Vaughan Williams J. The language is very ambiguous. I thought at first that Mr. Buckley's contention was right; but on further consideration I am not prepared to say that Vaughan Williams J.'s



construction of this is wrong; and when the consequences of the other construction are pointed out, I am rather disposed to think that he was right. I believe that my learned brothers do not agree with me on the meaning of these words; but, assuming in Mr. Hindley's favour that the words mean what he contends, it appears to me not to follow that he ought to be struck off the list of contributories. Mr. Hindley has signed an authority to put his name on this register of shareholders, and that authority is so worded that when he was put on the list he might have been put on properly or improperly—whether properly or improperly depending on an event not specified in the document itself, namely, whether the acceptance of his offer was within a reasonable time or not. When he knew that he was put on the register of shareholders on July 1, 1892, what did he know? He knew that he was there in pursuance of an authority which, as he knew, might have been exercised properly or improperly. He does not take the slightest trouble to inquire whether it was exercised properly or improperly; but he remains, from 1892 till the winding-up, a shareholder—acting as such, asking for certificates, voting as a shareholder; and now he says, “The authority was exercised improperly; strike me off the register.” It appears to me that such a contention is absolutely untenable, and not supported by any principle of law or equity or fair play. To put his case at the highest, it would be this—that he has become a shareholder pursuant to some trick played upon him or some unfair use made of his authority. Suppose that is true: how can a man get off the list of shareholders upon any such ground as that after an order for winding up the company? It appears to me that to allow him to do so would be inconsistent with the reasoning of the well known case of *Oakes v. Turquand* (1), and entirely opposed to the principles on which these cases have been decided for many years. With respect to *Beck's Case* (2), which Mr. Astbury pressed upon us, the ratio decidendi was this—that the agreement there was a void agreement, not voidable only, and was not capable of being ratified, and there was no time there for Mr. Beck to take steps to get his name taken off the register because the

C. A.

1896

HINDLEY'S  
CASE.

Lindley L.J.

(1) L. R. 2 H. L. 325.

(2) L. R. 9 Ch. 392.

C. A.: company was wound up almost immediately. That case has  
 1896 no real bearing upon this.

HINDLEY'S  
 CASE.

Lindley L.J.

Assuming, therefore, that Vaughan Williams J. was right as to the construction of this document, it appears to me that he has gone wrong in the conclusions which he has drawn from the facts which accompanied the registration, and the facts which have happened since. I think this is a plain case for holding Mr. Hindley liable as a contributory.

I hope that, considering the very doubtful construction of these underwriting letters, their form will be improved so as to make them less ambiguous than they are.

LOPES L.J. I also am unable to agree with the decision of the learned judge. Mr. Hindley signed what is called an underwriting letter in the form which has been read by Lindley L.J., and, no doubt, a good deal depends upon the true construction of that letter. I am far from saying that it is perfectly clear, and that it cannot bear the construction which was put upon it by Vaughan Williams J., and which is rather favoured by Lindley L.J. But speaking for myself, I should not put that construction upon it. The question turns on the meaning of the words, "This engagement is binding on me for two months from this date." Now, what do those words mean? It has been argued, and most ingeniously argued, that the words "this engagement" do not mean "this offer," but mean "this offer when consummated by acceptance," which acceptance must be made within a reasonable time. I cannot myself read that into those words. Taking them with the earlier part of the letter, I think they mean, "This offer is to be binding upon me for two months and no longer;" or, in other words, "This offer is to be binding for two months, but no longer—I, of course, having power to withdraw it before acceptance, if I think proper." I can put no other construction upon the letter than that. However, it is impossible to say that it is clear when there are such differences of opinion with regard to its meaning.

Of course, if that is the true construction of the letter this case is at an end, and Mr. Hindley must be a shareholder. But

even assuming that the construction I put upon the letter is wrong, and that the other construction is correct, then I entirely agree with what has been said with regard to what has happened since. Having regard to the conduct of Mr. Hindley, the time that has elapsed, his applying for a certificate of the shares, his acting as a shareholder, and his voting by proxy, it seems to me impossible to come to any other conclusion but that he was, and conceived himself to be, a shareholder in that company.

I think, therefore, that the decision of the learned judge is wrong, and that it must be reversed.

KAY L.J. The application here is for a balance order against a gentleman who is named, who is upon the register of shareholders of this company, and (the company now being in course of being wound up) is also upon the list of contributories. He has taken no proceedings whatever to have his name removed either from the list of contributories or from the list of shareholders; and I think he has been very well advised in not taking any course of the kind, but he is attempting to defend himself against this balance order by saying, "I am not a shareholder at all." That is the only possible defence. If he had said, "I have been induced to take my shares by fraud," or "I have been induced by some trick or improper dealing on the part of people whom I constituted my agents: those agents, I have discovered, exceeded my authority"—all those may be very good grounds before the winding-up began for removing him from the register; but after the winding-up none of those grounds will avail him.

The case stands in this way. He signed an underwriting letter, which has been read by Lindley L.J. I confess, with deference to contrary opinions, I have a very clear opinion of my own as to what that letter means. It begins as though it were an agreement. Of course, it is not an agreement—it is a mere offer by the writer, Mr. Hindley, and the last clause of it is this: "This engagement is binding on me for two months from this date." Now, what engagement was there when he

C. A.  
1896  
HINDLEY'S  
CASE.  
Lopes L.J.

C. A.  
1896  
HINDLEY'S  
CASE.  
Kay L.J.

signed that letter? The only engagement was the offer which he made upon certain terms to underwrite the shares which the public did not take up—that is, to take shares which the public did not take up; and the offer contains an authority to the persons to whom it was written, who were the promoters of this company, to apply for shares in his name, and an authority to the directors of the company to allot the same to him. I can only read the last clause in this offer as meaning, “I enter into this engagement subject to your accepting it, and I will keep this offer open for two months.” That seems to me the obvious meaning of those words; but it seems to me unimportant whether they are understood in that way or as the learned judge in the Court below understood them. He seems to have construed them in this way: “If this offer of mine shall be accepted, then the agreement which is completed by that acceptance shall be in force against me for two months.” With deference to those who think otherwise, it seems to me quite impossible to put this offer into those words. It seems to me a very extraordinary alteration of very simple words which, being contained in the offer, have the *primâ facie* meaning of keeping the offer open. But, supposing the meaning which the learned judge in the Court below put upon the words was the right meaning, what is the result? That there is no time whatever fixed for the acceptance of the offer; so that there is an authority to agents to apply for shares in the name of this Mr. Hindley, and for the directors of the company, with whom he was not contracting at all, to accept that application and put him on the register as a shareholder, and there is no limit of time for making that application. That would be the result of the construction put upon it by the learned judge; and the only limit that could be imposed would be a reasonable time.

I will try to put, in the strongest way I can, the argument against the view which I am myself inclined to take. It is said that this offer, on the face of it, refers to the prospectus of the company, and the prospectus of the company, which was then just about to be issued, begins with these words: “The



list will open on Monday, the 20th inst., and close on or before Wednesday, the 22nd inst., at noon." That, it is said, means, "The shares will be offered to the public on Monday, the 20th inst., and no shares will be offered to the public after Wednesday, the 22nd inst." The public then, if they mean to take shares, must take them during that short interval. Therefore, it is said, the reasonable time within which this offer must be accepted must be before the 22nd inst., because when the 22nd inst. had arrived it would be known whether the public took shares, and then it would be too late to accept this offer, for the risk which was intended to be run by this offer would then have been run; and the case was likened to a bet upon a race which if the race had been actually run would have been completely off. To my mind the suggested analogy is not an analogy at all. Here Mr. Hindley makes this offer perfectly well knowing—for it appears on the face of the prospectus—that the shares are to be offered to the public between the 20th and the 22nd inst., which, as this offer was dated the 17th, would be in a few days after the offer was made. Yet he does not say, "You shall accept my offer or reject it before the 22nd," nor, unless I am right in saying that the limit was two months, is there any limit within which this offer must be accepted.

Then his case is, "No communication was made to me of any sort or kind till the 1st of July, and I then for the first time got an intimation that I was put on the list of shareholders. I accepted that. I made no inquiry. I paid 25s. per share. I afterwards applied for a certificate. I sent in a proxy to vote afterwards. I waited for four years; the company was wound up in the interval; and now, my solicitor having obtained inspection of these documents, I find that upon the document containing this offer of mine is indorsed an acceptance which is dated the 1st of July; so that there was no acceptance until the 1st of July." But I think Mr. Hamilton's argument sound: that as Mr. Hindley knew on July 1 that up to that time there had been no communication to him of any acceptance of his offer, he might have inferred from that that there was no

C. A.

1896

HINDLEY'S  
CASE.

Kay L.J.

C. A.  
1896  
HINDLEY'S  
CASE.  
Kay L.J.

acceptance up to that date; but he made no inquiry, he went on, he accepted the shares allotted to him, paid the money upon them, and acted as a shareholder for nearly two years. In the course of the winding-up he gets some extremely clever solicitor to investigate the documents, and that clever solicitor finds the offer not to have been accepted till July 1. He puts his finger on that, and says, "Now I see a way of getting you out of the difficulty"; and he suggests that as a defence to the balance order, contending that he was never a shareholder at all. If we were to allow people to invent this kind of defence after a winding-up has begun, and four years after they knew perfectly well that they were shareholders, it would open an alarming prospect of litigation.

I think, with great deference, that the decision of the learned judge is entirely wrong, and that it ought to be reversed with costs here and below.

Solicitors for liquidator: *Cheston & Sons.*

Solicitors for Hindley: *Nunn & Popham.*

H. C. J.

*In re* TRADE-MARK OF JOHN DEWHURST & SONS,  
LIMITED.

[1895 D. 8522.]

C. A.

1896

April 16, 17.

*Trade-mark—Registration—Words “Calculated to Deceive”—Oriental Characters—Condition—Local Limitation—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by 51 & 52 Vict. c. 50, ss. 62, 64, 73. (1)*

*Held* (reversing the decision of the Vice-Chancellor of the County Palatine), that the Comptroller-General of Patents, Designs, and Trade Marks was justified in refusing to register a trade-mark containing as an essential part of it words amounting to a verbal description of a mark already on the register, on the ground that their use would be calculated to deceive, though the words were in the Burmese language and character, which are little known out of Burma.

*Held*, by the Vice-Chancellor of the County Palatine, that the comptroller was not justified in refusing to register words in an Oriental

(1) 46 & 47 Vict. c. 57, amended by 51 & 52 Vict. c. 50.

Sect. 62: “(4.) The comptroller may, if he thinks fit, refuse to register a trade-mark, but any such refusal shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions (if any) registration is to be permitted.

“(5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court; and in that event the Court shall have jurisdiction to hear and determine the appeal and may make such order as aforesaid.”

Sect. 64: “(1.) For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars: (a) . . . (e) A word or words having no reference to the character or quality of

the goods, and not being a geographical name.”

“(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them; but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.”

Sect. 73: “It shall not be lawful to register as part of or in combination with a trade-mark any words the use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design.”

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

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character as part of a trade-mark for cotton goods. On appeal this point was left open.

The holder of the trade-mark containing a picture of the object referred to by the words in question consented to the application for registration:—

*Held*, by the Court of Appeal, that this was important only as evidence that the use of the words was not calculated to deceive, and did not preclude the comptroller from deciding otherwise.

Under s. 62, sub-ss. 4 and 5 of the Act of 1883, the Court can order the registration of a trade-mark subject to any conditions. The applicants were willing to accept a registration subject to a condition that the mark should only be put on goods sent to Burma, there being evidence that in Burma the use of the words would not be calculated to deceive:—

*Held*, that the Court ought not to direct registration of a trade-mark subject to a condition that it shall be used only in a particular country, such a condition not being contemplated by the Act, and being incapable of being enforced.

THIS was an appeal by the Comptroller-General of Patents, Designs, and Trade Marks from an order of the Vice-Chancellor of the County Palatine of Lancaster, directing him to proceed with an application, No. 108,425 in class 23, by John Dewhurst & Sons, Limited, for the registration of a trade-mark in respect of sewing cottons.

The trade-mark in question consisted of a small label divided into three panels, on one of which was a shield bearing the device of three shells. On one of the other panels were printed certain Burmese characters, and indorsed on the application was the note, "The meaning of the Burmese characters appearing on the mark is 'The Golden Fan Brand.'" In the remaining panel were printed the words "Oriental Three Cord." The device and the Burmese words "The Golden Fan Brand" were claimed as essential parts of the trade-mark, the applicants disclaiming any right to the exclusive use of the added matter.

The application was lodged at the Manchester office in June, 1895, and on the 8th of July the applicants received from that office a letter which was in part as follows:—

"Regarding the Burmese characters appearing on the mark, it is the general practice of this office to require the disclaimer of Oriental characters other than those representing the applicant's name appearing in connection with an application for a new mark in the cotton classes. The difficulty experienced in



the examination of Oriental characters which are not understood renders it almost impossible to know where a doubt may exist."

An application was made for a hearing before the comptroller, and the matter was argued before the registrar, sitting for the Comptroller-General. The applicants declined an offer to register the words under s. 64, sub-s. 2, on their disclaiming any right to the exclusive use of them, and the comptroller refused to register the mark with these words as an essential part of it. The applicants appealed to the Board of Trade, who referred the matter to the Court of the County Palatine.

There were several trade-marks on the register containing fans. One of them, which was applied to the same class of goods as the mark now in question, had a golden fan. The owners of these trade-marks all consented to the application.

The managing director of the applicant company deposed as follows :—

"The predecessors of my said company, namely, John Dewhurst & Sons, adopted a trade-mark in all respects similar to the shield mark appearing upon the label D" (the trade-mark which it was sought to register) "in or about the year 1869, and between the year 1882 and the present time my said company or their predecessors have exported goods under such trade-mark to Burma, where it soon became commonly known amongst the natives upon the Burmese market as 'Shway Yatoung Tazai,' meaning 'The Golden Fan trade-mark.' In consequence of the last-mentioned fact and of our goods being distinguished and ordered under the aforesaid title, it became necessary to register the label which we now use, namely, the label D, having both the shield mark and the name given to the mark by the natives upon it. My company and their predecessors have done a very considerable business in thread goods in Burma for some time past, and the 'Golden Fan trade-mark' has proved in that country to be a most effective trade-mark, my said company having sold large and increasing quantities of thread under the said brand, and I have never seen or heard of any similar brand upon the said market."

The Vice-Chancellor of the County Palatine said that the applicants claimed registration under s. 64, sub-s. 1 (e), of

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

---

C. A.  
1896  
*In re*  
TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

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the Act of 1883 (46 & 47 Vict. c. 57), as amended by s. 10 of the Act of 1888 (51 & 52 Vict. c. 50), which mentions as one of the essential particulars of which a trade-mark must contain at least one, "A word or words having no reference to the character or quality of the goods, and not being a geographical name." That the comptroller contended that they were not such words, and that if they were he was acting properly in the exercise of his discretion in rejecting them. That the Burmese words were words within the meaning of sub-s. (e). That there was no dispute as to their meaning, "Golden Fan" or "Golden Fan Brand," an expression which obviously had no reference to the character or quality of the goods, and was not a geographical name, and that there was nothing in the sub-section limiting the choice of words to English words or words found in an English dictionary, or to words written or printed in Roman characters; and, on the other hand, the amended s. 64, sub-s. 3 (i), and the amended s. 74, sub-s. 2, referred to the foreign equivalent of a person's name which might appear in a mark, and need not be disclaimed. As regarded the discretion of the comptroller, it was not an absolute discretion, but subject to appeal, and there must be "a sufficient reason"—*In re Dunn's Trade-marks* (1)—for exercising it. In his Honour's opinion the grounds alleged on behalf of the comptroller did not constitute a sufficient reason. Discretion was given to him with which to work the Act, not to vary the Act, or amend it by making it more workable. That the practice called in question in this case amounted in fact to a practice of treating the Act as if it contained at the end of s. 64, sub-s. 1 (e), the words, "except words which are printed in Oriental characters and are not 'Chop' or 'Hong' marks." That the Act was a general Act, not one excepting cotton goods; and that, having regard to rule 15 of the rules of 1890, which recognised words not in Roman characters as being admissible parts of trade-marks, it was not a reasonable exercise of discretion to exclude Oriental words in Oriental characters as applied to cotton goods. As to the argument that the comptroller had properly exercised his discretion on the ground

(1) 41 Ch. D. 439, 443.

that the mark was calculated to deceive, his Honour thought the argument that Oriental marks would so resemble each other as to be calculated to deceive was an unsound argument. His Honour did not think that the mark was calculated to deceive, though the word "Fan" in Burmese formed part of it; and his Honour observed that the persons cited by the office who had registered devices of fans all consented to the application. The comptroller, therefore, was directed to proceed with the registration.

The comptroller appealed.

*Sir R. E. Webster, A.-G., Astbury, Q.C., Ingle Joyce, and Clarkson*, for the appellant. Ever since 1889 Oriental words have been excluded from registration in the cotton classes, except "Hong" and "Chop" marks, words which are the Chinese equivalents of the manufacturer's name. The Act of 1883 (46 & 47 Vict. c. 57), s. 62, amended by s. 8 of 51 & 52 Vict. c. 50, gives a discretion to the comptroller, subject to an appeal to the Board of Trade, whether a trade-mark shall be registered, and there is a power to impose conditions. It may be doubted whether marks which to an ordinary European eye are merely hieroglyphics are entitled to registration as "words" under s. 64, sub-s. (e). But supposing that to be got over, registration ought to be refused under s. 73 on the ground that the words are "calculated to deceive." The applicants have already on the register a similar mark with three shells, and the words "Three Shells Brand" form an essential part. They now seek to register a similar design with words in Burmese denoting "Golden Fan Brand," and it is suggested as a justification that the natives of Burma call the goods marked with the shells "The Golden Fan Brand." The registrar then has put before him a device which has nothing to do with fans, and he is asked to register it with words calling it the "Golden Fan Brand." That the holders of other fan brands have assented to the present application does not fetter the discretion of the comptroller. The practice of getting these consents is objectionable, for they do not appear on the register; so the owner of a fan brand might sell it, and there would be nothing on the

C. A.

1896

In re

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

C. A.  
1896  
~  
*In re*  
TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

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register to shew the purchaser that he took subject to the registration of the mark which the applicants now seek to register. The “Red Star” case (*In re Trade-mark of La Société Anonyme des Verrieres de l'Etoile* (1)) is strongly in our favour, and if these Burmese words were in English it would be precisely in point. The Court will not sanction the registering a falsehood because it is in a language which nobody here can understand. In *Eno v. Dunn* (2) it is strongly laid down that the onus is on the applicant for registration to shew that the mark he seeks to register is not calculated to deceive.

*Hopkinson, Q.C., John Cutler, and Stanley Wills*, for the applicants. The ground on which it is now sought to support the comptroller's decision is not the ground taken by himself. There is not a tittle of evidence that the words in question are calculated to deceive.

[LINDLEY L.J. You have evidence that it would not deceive the natives in Burma; but you may use it elsewhere.]

We are willing to assent to the condition to use this trade-mark nowhere but in Burma. The evidence is uncontradicted that in the Burmese market the applicants' goods are known as “The Golden Fan Brand,” and the case is exactly the same as *Johnston v. Orr Ewing*. (3) A person in Burma asking for “Golden Fan” goods would mean to ask for the applicants' goods, and it is therefore important for the applicants to have that term protected. It has been asked why we declined the proposal of the comptroller that we should disclaim the Burmese words. The result of our disclaiming them would be that everybody else might use them on goods sent to the Burmese market, and so other goods might be passed off as ours. We should thus have lost our common law right, and have been in the same position as the plaintiff in *Rosenthal v. Reynolds*. (4) The ground for refusing to register the words was that they were words in an Oriental character, as is shewn by the letter of July 8, 1895.

[KAY L.J. If these words were registered, would not the

(1) [1894] 2 Ch. 26.

(2) 15 App. Cas. 252.

(3) 7 App. Cas. 219.

(4) 9 Rep. Pat. Cas. 189.



registration prevent anybody in any part of the world from using the words "Golden Fan Brand" in any language?]

It is submitted that it would only prevent their use in Burmese characters. It would be a very unreasonable rule that registration of words in one language should prevent the registration of the same description in a different language for a different market.

[LINDLEY L.J. Is there anything in the Act to authorize a limitation of the use of a trade-mark to a particular country?]

The Attorney-General here stated that the Board of Trade had never given leave to register a trade-mark for a particular country.

KAY L.J. If your statements as to your goods being known in Burma as "Golden Fan Brand" goods be correct, you have already the right to restrain other people from using them, and do not want the protection of a trade-mark.]

The object of the Trade Marks Act was to relieve traders from the necessity of proving their course of business for a number of years in order to shew their exclusive right to sell goods by a particular description. A condition such as that inserted by agreement in *In re Keep's Trade-mark* (1) would meet the present case, as we want nothing but reasonable protection for our trade in Burma. Then the only persons whom our registration could be supposed likely to injure have consented to it.

[KAY L.J. A mark is brought which is so like one on the register as to be manifestly liable to be taken for it. Does the consent of the owner of the former mark relieve the comptroller from the duty of saying that the two marks are so much alike that the second will be calculated to deceive?]

The comptroller is willing to register this mark with a disclaimer which would take away all chance of protecting our trade in Burma. But the prohibition of s. 73 would apply just as much with the disclaimer as without it. But in fact the use of the words now in question is in no way calculated to deceive. Neither can registration be refused by reason of s. 72. That section deals with the whole trade-mark, and no one can

(1) 26 Ch. D. 187.

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

C. A.

1896

*In re*TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

possibly say that this mark, taken as a whole, is so like any other trade-mark as to be liable to be mistaken for it. The real ground on which the comptroller went was the objection to registering Oriental words, and that was the question contested before the Vice-Chancellor.

[LINDLEY L.J. The difficulty in your way is this—you could not register “Golden Fan Brand” in English, nor, I suppose, in any ordinary European language. Can you, then, do it because the language in which you propose to register it is an out of the way language which few people here know?]

In the “*Red Star*” Case (1) there was a strong opposition; if the application had not been opposed, the case would probably have been decided the other way.

[THE COURT expressed doubt of this.]

The case of *In re Rotherham’s Trade-mark* (2) is decisive in favour of registering Oriental words.

[KAY L.J. That case is not in point as to the question whether a mark is calculated to deceive.]

*Eno v. Dunn* (3) was a case where there was a deliberate attempt to get the benefit of another man’s reputation. Here there is nothing calculated to deceive, and the consents of the owners of the “Golden Fan” designs shew this. There is a discretion even where two marks are the same: *Mouson & Co. v. Boehm*. (4)

[KAY L.J. That was a refusal to take a mark off the register, which is quite a different thing from authorizing it to be put on.]

Under s. 62 the Court may impose conditions, and we do not object to a condition that this mark should be used nowhere but in Burma. In Sebastian on Trade-marks, 3rd ed. p. 377, is a collection of cases in which limitations have been imposed, and a note of them entered in the register. In *In re Keep’s Trade-mark* (5) and *In re Mitchell & Co.’s Trade-mark* (6) geographical limits were imposed. There is nothing to shew that this is confined to cases of agreement, though these cases

(1) [1894] 2 Ch. 26.

(2) 14 Ch. D. 585.

(3) 15 App. Cas. 252.

(4) 26 Ch. D. 398.

(5) Ibid. 187.

(6) 28 Ch. D. 666.

were cases of agreement. If the case is to be decided on the point of the mark being calculated to deceive, which has taken us by surprise, we ask liberty to obtain evidence that there is no tendency to deceive.

*Sir R. E. Webster, A.-G.*, in reply. The registration of the words as additional words with a disclaimer is very different in effect from a registration of them as an essential part of the trade-mark, which gives an exclusive right to the use of them.

C. A.  
1896  
~  
*In re*  
TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

LINDLEY L.J. This is an appeal from the decision of the Vice-Chancellor of the Duchy of Lancaster, who has directed the Comptroller of Trade Marks to register a design or label numbered 108,425. The applicants, John Dewhurst & Sons, Limited, desire to register this design under these circumstances. It appears that they deal in sewing, crochet, and embroidery cottons of various kinds. Their trade is especially a Burmese trade, and it appears from the affidavit of Mr. J. B. Dewhurst, the managing director of the company, that the predecessors of his company—namely, John Dewhurst & Sons—adopted, in or about the year 1869, a trade-mark in all respects similar to the shield mark appearing upon the label now before us. [His Lordship here read the rest of the passage given above from Mr. J. B. Dewhurst's affidavit.]

That shews the reason why the company desire to register this label, although it has on the register, and has had for some years, a portion of the label—namely, that part which consists of three shells on a gold shield. They have also on the register the words “Three Shells Brand” under the label. But the affidavit which I have read shews that the company had a reason for asking to be allowed to register something more. They want to register the words “The Golden Fan Brand” in Burmese characters. The object of that, of course, is obvious—it will give them a monopoly of the use of these words as part of their trade-mark.

They apply to the comptroller to register those words under s. 64 of the amended Trade Marks Act of 1883, clause (e): “A word or words having no reference to the character or quality of the goods, and not being a geographical name.” It is

C. A.

1896

*In re*TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

Lindley L.J.

obvious that the words "The Golden Fan Brand" come within that description. They are words in Burmese, and it is sought to register them in Burmese characters. Thereupon the comptroller takes up this position. He says first of all it is not the practice of the office to register Oriental words for cotton goods at all except "Chop" and "Hong" marks, which denote the names of firms. That is an objection of very great importance, but it is one with which we are not now dealing. The Vice-Chancellor of the Duchy has overruled it. Then the comptroller takes another objection. He says, "If you like to register these hieroglyphics under the second part of s. 64 and disclaim them as part of your trade-mark, I have no objection; but if you insist upon my registering these as words under clause (e) of s. 64, so as to make them an essential part of your trade-mark, then I do object, because it appears to me that they will necessarily be calculated to deceive." And he grounds that objection upon this. He says, "I have already upon the register several trade-marks of fans applicable to the class 23 in cotton goods, and in particular there is on the register a mark of Boyd & Co.'s which is a golden fan. Therefore I have on the register a golden fan applicable to the same class of goods; and you are asking me to register, not as additional words with a disclaimer, but as an essential part of a new trade-mark, not a golden fan, but the words 'Golden Fan'; and, having regard to the principle which was laid down by the Court of Appeal in the '*Red Star*' Case (1), I decline to do so." The Vice-Chancellor of the Duchy, with reference to that objection, came to the conclusion that the "*Red Star*" Case (1) differed from the present.

Now the way in which it strikes me has been already pointed out in the course of the argument. Could Messrs. Dewhurst require the comptroller to register their mark if these hieroglyphics were expressed in language intelligible to Englishmen? In other words, if instead of the hieroglyphics you had their equivalent, "The Golden Fan Brand," ought the Court to compel the comptroller to put such a mark on the register? I say that unquestionably the Court ought not to do so. The

(1) [1894] 2 Ch. 26.



objection to it would be that the words must be calculated to deceive because they only express in words what the golden fan of Mr. Boyd expresses to the eye. That is the principle upon which the *Star Case* (1) proceeded, and I do not think that any evidence which could be adduced would get over that objection, because we know perfectly well that if you once put upon the register a golden fan in the shape of a picture like Mr. Boyd's, and you also put upon the register a mark called "The Golden Fan," although without a golden fan, the two must mislead the public, and Mr. Boyd's consent is no answer to that. His consent is important in this respect, that it would be some evidence that in his opinion the words were not calculated to deceive, at all events to any extent which injured him. I am assuming, of course, that there are no pecuniary arrangements between them which would amount to a purchase and sale.

This goes a long way towards answering the question. The comptroller says, "You bring me these hieroglyphics, about which I know nothing. You must tell me what they mean." Rule 15 of the Rules of 1890 says: "Wherever a mark consists of or includes words printed in other than Roman character, there shall be given at the foot or on the back of each representation a translation of such words, signed by the applicant or his agent." I cannot find any similar rule applicable to ordinary European languages, such as French, German, or Norwegian, in which Roman letters are used. I suppose that the comptroller or the Board of Trade have persons sufficiently conversant with those languages to render a translation unnecessary. This rule is important, as shewing that the comptroller ought not to register words in Oriental characters without knowing what they mean. He is entitled to require a translation; and accordingly we have on the application by Messrs. Dewhurst this indorsement on the form which they have signed and sent in: "The meaning of the Burmese characters appearing on the mark is 'The Golden Fan Brand.'" The comptroller then says, "You are then asking me to put on the register the words 'The Golden Fan Brand,' though not in English—and for what object? In order that this may be called

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

Lindley L.J.

(1) [1894] 2 Ch. 26.

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

Lindley L.J.

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‘The Golden Fan Brand’—that is to say, for the very same object which you would have if you were to put these words on the register in the English language. The principle of the “*Red Star*” Case (1) is applicable; and I, in the exercise of my discretion, think I ought not to do it.” Can the Court say he was wrong in that? I do not think that it can.

Let us, then, consider what the position of the register will be, and how far the interests of the public will be protected if this mark is registered. As to the consents, I do not say that they are immaterial. They are valuable as affording some evidence that there will not be deception; but when you come to consider that these trade-marks are on the register for an indefinite time, when you consider that unless they are restricted to particular countries—which is a point I will deal with presently—they are applicable all over the world, and when you consider how they are sold and passed from one hand to another, these consents do not protect the public in the least; and I do not see how any amount of evidence can get over the difficulty that there will be upon the register two trade-marks, one a picture of a gold fan, and the other the words “The Golden Fan,” which ought not in my judgment to be allowed by reason of the obvious deception there will be if these words are used in the course of trade in other countries than Burma. Therefore, I think on that principle, which is an extremely far-reaching one, that the comptroller is right. I think that it does not matter what the language is, nor what the hieroglyphics are, if their meaning is a mere verbal description of a mark already on the register. If you have got a mark on the register applicable to cotton goods of a golden fan, you cannot have another mark called a “Golden Fan” in any language or in any hieroglyphics. That appears to me to be the real broad ground upon which we ought to decide this case.

I pass on to consider another point. It was urged by Mr. Hopkinson that whether these words are registered as additional words and disclaimed, or whether they are registered as words and as essential parts of the trade-mark, there will be the same probability or possibility of deception, supposing that

(1) [1894] 2 Ch. 26.

there is any deception, in either case. I think that the Attorney-General's answer to that is sufficient. It is a very different thing practically, commercially, and in business to register words as an addition to your trade-mark with a disclaimer of the right to any exclusive use of them, and to register those same words as an essential part of your mark which gives you an exclusive right to use them. Whether the comptroller was not a little too indulgent in saying, "I will accept this mark if you will treat these words as an addition to your mark with a disclaimer," I do not know, nor is it necessary to consider; but I do see that there is an immense practical commercial difference between the two things, and it appears to me that it is not illogical or unreasonable for the comptroller to take the view, "You may have these words if you like, but only with a disclaimer under the second clause of s. 64."

Then as to the imposing a geographical limit. It is contended, and I think rightly, that under s. 62, sub-ss. 4, 5, the Court can order this mark to be registered subject to any conditions which the Court may think proper. [His Lordship read those sub-sections.]

The applicants then say that they are willing to have a registration upon the condition that they shall put the mark only on goods exported to Burma. That is a plausible suggestion, and one which requires consideration. The first consideration is, what power is there to do it? Under the Act of Parliament, apart from the general words which I have read, there is nothing. If you look to s. 78, which says what the register is to contain, you find this: "There shall be kept at the Patent Office a book called the Register of Trade Marks, wherein shall be entered the names and addresses of proprietors of registered trade-marks, notifications of assignments and of transmissions of trade-marks, and such other matters as may be from time to time prescribed." In s. 117 we find that "'Prescribed' means prescribed by any of the schedules to this Act, or by general rules under or within the meaning of this Act." There is nothing in the schedule, and nothing in the rules which have been made under the authority of the Act, which authorizes the Court to impose such a condition as

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

—  
Lindley L.J.  
—

C. A.  
1896  
~  
*In re*  
TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.  
Lindley L. J.

that which is suggested. In other words, there is no provision made by the Legislature for granting a trade-mark which shall be used only in one particular country; and, upon reflection, one can see good reasons for it. If you consider not only the view which would be taken by foreign governments if we did anything of the kind, but the extreme difficulty of enforcing any such condition in practice, one sees the good sense of there being no provision for registering a trade-mark which shall be confined to any particular country.

Then it is said that there are instances of trade-marks being registered with such a restriction, and reference was made to *In re Keep's Trade-mark* (1) and *In re Mitchell & Co.'s Trade-mark* (2), in which the Court ordered the comptroller to enter upon the register a note of an agreement between the two litigants, as I may call them, respecting the use which should be made of a particular registered mark. I will observe that those cases were decided upon the interpretation of a rule subsequently abolished, containing language which possibly might justify that course. I doubt very much whether those cases have not gone too far; but at all events, they fall far short of what we are asked to do here. The utmost the Court has ever done is to say, "We will direct the comptroller to put on the register a note of an agreement which binds the registered owner of a trade-mark to some rival as to the mode in which he shall use that mark." We have no such agreement here, and we are not asked to direct the comptroller to put on the register any memorandum of any such agreement; but we are asked to go further and say, "You shall be put upon the register upon condition that you only use these marks upon goods which are exported to Burma." I think we ought not to do it; for I doubt very much whether the Legislature ever contemplated such a mode of working the Trade Marks Act. Unless the greatest care was taken we should raise questions of international law of a very serious character and of very great difficulty, and we should be imposing terms which we could not possibly enforce, which of itself is quite a sufficient reason for not imposing them.

(1) 26 Ch. D. 187.

(2) 28 Ch. D. 666.



Upon these grounds, therefore, I think that on this point the comptroller is right. I purposely abstain from saying anything about what I understand is the great point, namely, whether he is right in saying that he ought not to be compelled to register any Oriental words. I will say nothing about that till the point calls for decision and has been argued; but upon the broad ground that there is upon the register a gold fan applicable to cotton goods, and that the mark now sought to be registered contains the words "Golden Fan" with reference to the same class of goods, I think that the comptroller was perfectly justified in declining to register it; and therefore this appeal must be allowed.

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

Lindley L.J.

LOPES L.J. I have had an opportunity of talking this matter over with Lindley L.J., and have very little to add. In point of fact, I can add nothing to what he has said; but it occurs to me that this short answer may be given to the case. If the words sought to be registered had been in English and had been the words "The Golden Fan Brand," I take it to be perfectly clear that the comptroller would not and ought not to have permitted the registration of them as an essential part of the trade-mark, because in the "*Red Star*" Case (1) it was distinctly held that if words are sought to be registered which convey the same meaning as any symbol or picture which had been previously registered would convey, then those words cannot be registered as an essential part of the trade-mark, because they would be calculated to mislead or to deceive. But it is said here that these words, being in Burmese, would not be calculated to mislead or to deceive. Now, if we were to hold that the mere fact that the words in question were in the Burmese language was sufficient to rebut the probability of deception, I ask, where are we to stop? What would be said with regard to French? What would be said with regard to German? What would be said with regard to Welsh? In point of fact, if we pushed that matter to its logical conclusion we should have to go the length of holding that the fact of the words being in any foreign language would be sufficient to

(1) [1894] 2 Ch. 26.

C. A.  
1896  
*In re*  
TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.  
Lopes L.J.

rebut the probability of deception. In my opinion that cannot be done. I think, therefore, that the comptroller was perfectly right in refusing to permit the registration of these words without a disclaimer of them as an essential part of the trade-mark.

I desire to say one word about a matter which I consider very important. We have been told here that the rival tradesmen who have trade-marks consisting of pictures conveying the same idea as the words sought to be registered consented to this registration. To my mind those consents are absolutely immaterial. It may be, and I think it is, properly said, that they are some evidence of there not being a probability of persons being deceived, and to that extent I think they may be used; but to say that they are to have any greater effect would, I think, be most mischievous. The general public are to be protected as well as traders. The public have no notice of these consents; and it is obvious, and in point of fact it is stated to have happened, that these consents might be bought and sold; and anything more mischievous than that it would be impossible to imagine, having regard to the principal object of this Act of Parliament.

Then it was also suggested that we might limit the use of these words to goods exported to Burma. To my mind such a limitation would be absolutely useless. I cannot see how by any possibility it could be made enforceable, and I think, moreover, it would be against the policy of the Act. It seems to me essential that the register should be kept clear and in proper order; and if limitations of this kind could be inserted on the register, I do not think that it could be kept in that order in which it should be kept if it is to be of that use which it was intended to be. I think, therefore, that the decision of the comptroller was right, that the decision of the Vice-Chancellor was wrong, and that this appeal ought to be allowed.

KAY L.J. Messrs. Dewhurst, who are the applicants here, had upon the register a trade-mark consisting of three shells in white upon a golden shield; they also had on the register a trade-mark of that shield with the shells upon it, and the words "Three Shells Brand." They were desirous of registering

another trade-mark consisting of the golden shield with the three shells on it in white, the words "Oriental Three Cord," and above those words certain Burmese characters. They applied to register this mark for that part of class 23 which is described as "Sewing, crochet, and embroidery cottons of various kinds." The comptroller was willing to allow this new combination to be put upon the register if the characters in Burmese were treated as added words under the 2nd sub-section of s. 64 of the Act of 1883, as amended by the 10th section of the Act of 1888, but not with those characters as an essential part of the trade-mark. [His Lordship here read that sub-section.]

Now in the application which Messrs. Dewhurst made they stated that the essential particular of the trade-mark was the combination of the devices and the Oriental characters consisting of the words which they there translate "The Golden Fan," and they disclaimed any right to the exclusive use of the added matter. The comptroller says, "You must disclaim the use of these Oriental characters before I allow them to come upon the register." Messrs. Dewhurst objected to this condition, as they intended to make the Burmese characters an essential part of their trade-mark under s. 64, which provides that, "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars," and then the particular sub-section under which they wish to register these words is sub-s. 1 (e), "A word or words having no reference to the character or quality of the goods, and not being a geographical name."

Now there were upon the register five different representations of fans belonging to three different people. One registered by a person named Boyd was a golden fan. As was pointed out by Lindley L.J., it is essential for an applicant, if he is going to use as part of his trade-mark any other characters than Roman characters, to send to the comptroller a translation of those characters, that the comptroller may know the meaning of the words; and the meaning of these words as explained on the face of the application is "The Golden Fan." On the back of the application the translation is "Golden Fan Brand." Now I

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

Kay L.J.

C. A.

1896

*In re*

TRADE-MARK  
OF JOHN  
DEWHURST  
& SONS,  
LIMITED.

—  
Kay L.J.  
—

cannot help remarking that there is no golden fan upon this mark. There were three shells which were not in gold put upon a golden shield. But the evidence given by Mr. Dewhurst is to the effect that the Burmese seem to have taken the shells for fans, and they have called the goods of the applicants "Golden Fan or Golden Fan Brand goods," and they are known by that description in the Burmese market. This is rather curious, because the shells are not in gold and they are not fans; but the evidence is not contradicted, and for the purposes of this application we must take it to be true. So that the comptroller being compelled by the rule to consider the meaning of these Oriental characters, and being told that the meaning is "Golden Fan Brand," finds he has already upon the register a golden fan, which is upon the register for all the goods in class 23, including of course the cotton goods, "sewing, crochet, and embroidery cottons of various kinds," for which Messrs. Dewhurst want to register this mark.

What, then, is the comptroller to do? He says, "I look to the Act of Parliament, and I find in s. 73 these words: 'It shall not be lawful to register as part of or in combination with a trade-mark any words the use of which would by reason of their being calculated to deceive or otherwise be deemed disentitled to protection in a court of justice.'" He is therefore to consider, not only whether the mere appearance of the words is calculated to deceive, but whether the use of those words would be calculated to deceive. Suppose the owner of the golden fan trade-mark, which, as I have said, extends to the whole of the goods in class 23 of which these cottons are part, chose to carry on his trade in Burma, and a trade in cottons of this very kind, would not the use of the words "Golden Fan Brand" in Burma be calculated to deceive people who wanted to buy golden fan goods? There cannot be the least doubt about that.

But then it is said that objection is entirely got rid of, because the persons who have these marks on the register have been applied to, and they have one and all signified their consent to these Burmese words being put on the register. But I do not think that is conclusive. It is, indeed, some



evidence that they are not calculated to deceive; but if the comptroller thinks that the use of them is calculated to deceive he is not concluded by the consent, even leaving out of sight the mode in which that consent may have been obtained. I therefore think that in the exercise of the discretion of the comptroller, when he is asked to put this mark upon the register and is told that the parties are not satisfied to treat these words as added words, and to disclaim the exclusive use of them, but intend to have them as an essential part of this trade-mark which he is asked to register, he is justified in saying, "I think if I were to put these words on the register the use of them would be calculated to deceive; and I therefore do not think it right to put them upon the register in whatever language the words happen to be, and whether they are or are not intelligible to an ordinary European, because it is a part of this legislation embodied in rule 15 that I shall know what is the meaning of the Oriental words, and shall consider that meaning with reference to s. 73, which says that I am not to register any words the use of which may be calculated to deceive." Whether the comptroller was right in saying, "I will register them as added words if the condition imposed by the statute is complied with" I do not at present say. Compliance with it was refused; and accordingly the only mode in which he could have registered the words was as an essential part of the trade-mark.

Then it is said, "We are quite content to submit to a condition that these words shall not be used in any country except Burma." In the first place, I cannot find that this Act of Parliament enables the Court to put upon the register a trade-mark with a limitation of that kind. I should expect, if that were the meaning of the Legislature, to find in the Act of Parliament a distinct provision that a trade-mark may be registered for one country only. There is nothing of the kind in the Act of Parliament. The only section which in any way can be treated as having that meaning, or giving to the comptroller or the Board of Trade or this Court any power of limiting in that way, is s. 62, which refers to the imposition of conditions; but I do not think that imposing conditions in that section

C. A.

1896

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In re

TRADE-MARK
OF JOHN
DEWHURST
& SONS,
LIMITED.

 Kay L.J.

C. A.

1896

*In re*TRADE-MARK
OF JOHN
DEWHURST
& SONS,
LIMITED.

Kay L.J.

means a limitation of the geographical area within which the trade-mark can be used. I think that if that had been the meaning it would have been expressed in more explicit and plain words, and I do not find anything in the Act which authorizes any such construction. There is nothing in the Rules which empowers the Board of Trade or this Court or the comptroller to make a limitation of that kind when a trade-mark is put on the register. I therefore think that point does not avail the respondents.

These are the only points on which I think it necessary to say anything in addition to what has been already said; and for these reasons I think that the discretion exercised by the comptroller in this case was properly and wisely exercised, and that it ought not to be interfered with.

LINDLEY L.J. I merely wish to add this. If the comptroller thinks it right to allow these words to go on the register as additional words, subject to a disclaimer, I do not wish to express any opinion to preclude him from doing so.

Solicitors: *Solicitor to the Board of Trade; C. U. Fisher, for Sale, Seddon & Co., Manchester.*

H. C. J.

EDWARDS v. WALTERS.

[1895 E. 178.]

Promissory Note—"On Demand"—"At Maturity"—*Delivery*—*Renunciation*
—*Parol*—"Maker"—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c. 61*),
ss. 62 (*sub-s. 1*), 89.

C. A.
1896
KEKEWICH
J.
Jan. 31.
C. A.
April 25, 27,
28.
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By s. 62, sub-s. 1, and s. 89 of the Bills of Exchange Act, 1882, when the holder of a promissory note at or after its maturity absolutely and unconditionally renounces his rights against the maker the bill is discharged, but the renunciation must be in writing unless the note is delivered to the "maker":—*Held* (affirming the decision of Kekewich J.), that a parol renunciation by the holder of all rights under a promissory note, accompanied by a delivery of the note to a devisee of the maker, the real estate in whose hands was liable to the payment of the debt, and who had for some time paid interest on it, did not operate as a discharge, for that although the word "maker" would probably be held to include the executors or administrators of the maker, it did not include his devisees.

On August 1, 1865, the Reverend Abraham Edwards lent his brother-in-law, Walter Walters, 200*l.* on the security of a promissory note of that date, "I, Walter Walters, of &c., promise to pay to the Rev. A. Edwards on demand the sum of 200*l.*, with interest for the same at the rate of 4 per cent. per annum." No other security was given for the loan.

Walter Walters died in 1866, having in 1865 made a will under which his two children, Thomas Walters and Anne Evans, widow, became respectively entitled to certain real estates in the county of Cardigan devised by the will, and a legacy. The residue of his real and personal estate he gave to his executors in trust to pay his debts; but if the residue did not equal his debts, the deficiency was to be made up out of the real estates and legacy devised and bequeathed to his two children. After the testator's death his executors administered and wound up his estate, and paid all his debts with the exception of the 200*l.*, of the existence of which they were then ignorant.

On October 2, 1894, Abraham Edwards died, and shortly afterwards letters of administration with the will annexed were granted to his niece, Elizabeth Edwards. In 1895 she brought

C. A.
1896
EDWARDS
v.
WALTERS.
—

this action against Thomas Walters and Anne Evans as devisees of the real estate of Walter Walters, and also against his executors, for, amongst other things, administration of his estate, and payment by the defendants or some or one of them of the 200*l.*, with interest up to judgment.

In their defence the defendants pleaded that A. Edwards had absolutely and unconditionally renounced and released all his rights in the note, and had delivered up the note to the defendant Anne Evans; also that the plaintiff's claim was statute-barred.

The action came on for trial before Kekewich J. on January 31, 1896, the main question being whether the liability of Walter Walters or his estate upon the promissory note had, under the circumstances of the case, been discharged.

In answer to interrogatories the defendants, the executors of W. Walters, swore that when they administered and wound up his estate they were entirely ignorant of the existence of the debt of 200*l.*, and that, although they were administering Walter Walters' estate with Mr. Edwards' knowledge, the latter never said a word to them as to the existence of the debt or of the note, neither were they ever asked by him for, nor did they ever pay, any interest on the 200*l.*

The defendants, Thomas Walters and Anne Evans, deposed in answer to interrogatories, and also in the witness-box, that when their father, Walter Walters, died they were infants, and Mr. Edwards and his wife then treated them with parental kindness, for which they felt very grateful to them; that accordingly, later in their lives, after hearing from Mr. Edwards and his wife, or one of them, of his having lent the 200*l.* to their father, they voluntarily and because they thought it right, but without ever being requested by Mr. Edwards or his wife so to do, made at various times some payments to Mr. Edwards equal in amount to interest at 4 per cent. on the 200*l.*, there being only seven such payments, of which the first was made in 1878, and the last in 1889.

The circumstances as to the alleged renunciation and release, which was not in writing but verbal only, were thus deposed to by the defendant Mrs. Evans. In April and June, 1891, she

went on visits to her uncle, Mr. Edwards. On one of those occasions—she did not remember which—she, her uncle, and his wife were sitting together in the dining-room of his vicarage at Glyntawe, in the county of Brecon, no one else being present. Her uncle said to his wife, “Get that for Mrs. Evans.” His wife thereupon got up, unlocked a drawer in the room, took out of it a paper, and, bringing it in her hand, asked him, “Am I to give it to her?” To which he replied, “Yes.” His wife then handed to Mrs. Evans the paper, which was the promissory note. Upon Mrs. Evans thanking them, her uncle said, “It is not of much value: I could not claim it if I wished: it is too old.” Mrs. Evans replied that she believed it was not too old, as interest had been paid recently enough for him to claim upon it; whereupon he said, “Well, that makes no difference. I give it to you.” Mrs. Edwards then said, “Very likely she will not be able to use it”; at which Mr. Edwards laughed, and said, “Very likely; but some people are 'cute enough for anything.” That was all that was said. Mrs. Edwards died in December, 1893.

It appeared that Mr. Edwards was, during the latter part of his life, in very reduced circumstances, and applied for assistance to the Corporation of the Sons of the Clergy, and also to the trustees of the Cholmondeley Charity. In support of these applications, he sent in accounts of the sources and particulars of his income. These accounts were put in evidence at the trial, and neither of them contained any reference to the promissory note or the 200*l.*, or any entry of interest arising therefrom.

The Rev. William Powell, the vicar of the parish in which Mrs. Evans resided, deposed that in June, 1891, she shewed him the promissory note. An attempt was made to prove a conversation which took place between the plaintiff, Miss Edwards, and her uncle, Mr. Edwards, relative to the 200*l.* on an occasion subsequent to the interview deposed to by Mrs. Evans; but, on objection by the defendants' counsel, his Lordship held the evidence inadmissible.

The argument was opened by the counsel for the defendants, it being admitted that the onus lay upon them of proving that there was no liability remaining upon the promissory note.

C. A.
1896
EDWARDS
v.
WALTERS.
—

C. A.
1896
EDWARDS
v.
WALTERS
—

Renshaw, Q.C., and *W. D. Rawlins*, for the defendants. The law applicable to a bill of exchange or a promissory note is that the liability of the acceptor or other party may be discharged by an express renunciation of his claim on the part of the holder, without consideration: *Byles on Bills*, 14th ed. pp. 265-6. The law is similarly stated in earlier editions of that work, and is so laid down in *Foster v. Dawber* (1), where the statement in *Byles on Bills* is quoted with approval. And the law is not altered by the Bills of Exchange Act, 1882, s. 62, sub-s. 1, which is made applicable to promissory notes by s. 89. (2) Sect. 62 only applies to a bill or promissory note at or after maturity; and here the promissory note was never so, because it was never presented: it was payable only "on demand." The old common law of merchants applies—that is, that the traditio or delivery-up of the note is sufficient to constitute a renunciation. Accordingly we say, first, that this note was not at maturity at the time when, according to *Mrs. Evans'* evidence, the renunciation was made, for it had never been presented; and, secondly, that the necessity of the renunciation being in writing is got rid of by the delivery-up of the note. The case is therefore taken out of *In re George*. (3)

[KEKEWICH J. referred to *In re Brown's Estate*. (4)]

"Acceptor" in the Act includes any person liable to pay, whether as legal personal representative of the acceptor, or otherwise.

Bramwell Davis, Q.C., and *Griffith Jones*, for the plaintiff, were not called upon.

KEKEWICH J. If a parol renunciation is sufficient, when given to any person liable on the bill, I think there was a parol renunciation sufficient in the present case to discharge all the defendants. That, of course, depends upon the oral evidence and upon some documents which it is very difficult to weigh; but,

(1) 6 Ex. 839, 851.

(2) Sect. 62, sub-s. 1, is as follows:
"When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights

against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."

(3) 44 Ch. D. 627.

(4) [1893] 2 Ch. 300.

in my opinion, the circumstances are so much in favour of the account given by Mrs. Evans, that, although she does not recollect precisely the words used on the occasion on which the renunciation was said to have been made, I think I must accept that account as in substance true; and that statement made at the time cannot be contradicted by statements made in conversation by Mr. Edwards after that date, and repeated by persons in the witness-box to whom they are said to have been made.

It appears that some time in 1891, probably in April, possibly in June, Mr. Edwards gave this promissory note to Mrs. Evans; and it appears to me, upon the evidence, that he gave it to her with the intention of parting with all his rights in it. The fact that Mr. Powell stated that she shewed the bill to him is a strong corroboration of her evidence. Therefore, so far, it appears to me that none of the documents are opposed to that view, but, on the contrary, seem to support it. I therefore come to the conclusion that there was an absolute gift of the note to Mrs. Evans.

The real difficulty is with regard to the question of law. The law is to be thus found stated in chapter 16 of Byles on Bills, 14th ed. of 1885, pp. 265-6: "It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration. To this rule it has been repeatedly held that contracts on bills of exchange form an exception, and that the liability of the acceptor or other party, remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder, without consideration."

That statement of the law is confirmed by a note to that passage; but it is more than confirmed, in fact it is established, by *Foster v. Dawber* (1), where the passage, as it occurs in the 5th edition of Byles on Bills, is quoted and approved.

Then steps in the Bills of Exchange Act, 1882, s. 62, and on that arises the present difficulty. Sect. 62 says this, in sub-s. 1: "When the holder of a bill at or after its maturity absolutely

C. A.

1896

EDWARDS

T.

WALTERS.

Kekewich J.

(1) 6 Ex. 839.

C. A.
 1896
 EDWARDS
 v.
 WALTERS.
 Kekewich J.

and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."

Now, the first question is whether this note was "at maturity." If it was at maturity, then the renunciation must be in writing, unless the bill is given up to the acceptor, and here no renunciation in writing has been proved or attempted to be proved: the renunciation was merely by parol. The point has, in my opinion, been perfectly settled by authority; a note payable "on demand" is "at maturity" immediately upon its being made. The law is so stated in the case of *In re George* (1), before Chitty J.; and it is also to be found in other cases. Another case, to which I referred during the argument, *In re Brown's Estate* (2), also shews that a promise to pay "on demand" is a present debt, and that the Statute of Limitations begins to run from the making of the note, no demand being necessary before bringing an action.

Accordingly, I take it to be reasonably clear that the note was already at maturity at the time it was delivered up to Mrs. Evans, and, therefore, the renunciation ought to have been in writing to come within the Act.

There is this other point. There is an exception to that rule if the bill or note is delivered up to the "acceptor." It was delivered up to Mrs. Evans. She was not in any sense the maker of the note: the note was made by another person, the person whose real estate she claims. She is his devisee. She makes a claim to be relieved from liability so as to clear the real estate, which she of course takes subject to the testator's debts. In this sense only she is liable on the note. She cannot be sued on the note, not being in any sense the maker of it. The Act says "acceptor." That may mean any person liable on the note, or any person whose estate can be made liable upon a promise to pay. But I should not suppose, at least I am not prepared to say without consideration, that it would include a trustee in bankruptcy. It is enough for this case that Mrs. Evans is not liable on the note, though the estate which she claims is liable.

(1) 44 Ch. D. 627.

(2) [1893] 2 Ch. 300.

Therefore, my view is that, according to the law, the renunciation must be in writing, because the bill is not within the exception that "the bill is delivered up to the acceptor," though it was delivered up to Mrs. Evans. This view, it may be observed, is in accordance with the note appended to s. 62 by Mr. Chalmers, the author of the Act, on p. 213 of the 4th edition of his book.

With regard to the form of judgment, administration does not appear to be necessary. In my opinion the 200*l.* ought to be forthcoming to the plaintiff as Mr. Edwards' legal personal representative, and this sum, with interest from the time it was last paid—that is, in 1889—and also the costs of the action, so far as it is an action to get the money out of Walter Walters' real estate, must be raised out of the real estates specifically devised to the defendants Thomas Walters and Anne Evans: and there should be a declaration that, until payment, the money will be a charge upon these particular estates.

G. I. F. C.

The defendants appealed. The appeal came on for hearing on April 25, 1896.

Renshaw, Q.C., and *Butcher*, for the appellants. Kekewich J. was in our favour on all points of the case, except that he thought the Bills of Exchange Act, 1882, came in and made a renunciation in writing necessary. Our first point is that the Act does not apply, and that the case is governed by the old law according to s. 97, for that "acceptor" in s. 62 is to be taken literally as applying to the acceptor himself and no one else, and that the old law applies to every one besides. Now, by the old law, the liability on a bill may be discharged by an express renunciation by the holder without writing: Byles on Bills, 15th ed. 264; *Foster v. Dawber*. (1) Here there was certainly an express renunciation evidenced by the giving up of the note. But, supposing that the word acceptor is not to be taken in its confined sense, it must include all persons liable to pay, and the delivery to Mrs. Evans was sufficient.

(1) 6 Ex. 839, 851.

C. A.
1896
EDWARDS
P.
WALTERS.
Kekewich J.

C. A.
1896
EDWARDS
v.
WALTERS

[LINDLEY L.J. Does the old law apply to any but negotiable instruments, and is this instrument negotiable?]

[*Rex v. Box* (1) was referred to.]

Sect. 8, sub-s. 4, of the Act of 1882 makes this instrument negotiable, and it was so at the time of its being handed over. Sect. 59 appears to include some representatives of the acceptor, and the intention of the Legislature may be taken to be that there must be delivery of the note to the person interested in getting it. The executors of Mr. Edwards are not holders of the note, and have no right to become so, for it was not given to any one in trust for them. Mrs. Evans is entitled to the piece of paper, and the plaintiff cannot recover without producing it. Lastly, we say that what took place amounted to an equitable release of the debt. Giving up the security is an equitable release: *Taylor v. Manners*. (2)

Bramwell Davis, Q.C., and *Griffith Jones*, for the plaintiff. Our answer to the objection that we are not holders of the note is that we are not suing on the note, but in respect of the debt, which has been kept alive against Mr. Walters' real estate by the payment of interest. His executors are not liable on the note, for it is barred by the Statute of Limitations. If we were suing other persons, we might be in a difficulty because we have not the note; but that difficulty is avoided because the note is in the hands of one of the parties we are suing. The leading authorities as to debts being kept alive against real estate by the payment of interest are *Roddam v. Morley* (3), *In re Hollingshead* (4), and *In re England*. (5)

[KAY L.J. referred to *Coope v. Cresswell*. (6)]

The paper was given up, but the debt remains, and has been kept alive against the real estate by payment of interest. Sects. 61, 62 and 63 were intended to form a code as to the way in which bills and notes can be discharged otherwise than by payment. A clear intention to give the note to the person liable upon it is not enough: *In re George*. (7) The Court has

(1) 6 Taunt. 325.

(2) L. R. 1 Ch. 48, 56.

(3) 1 De G. & J. 1.

(4) 37 Ch. D. 651.

(5) [1895] 2 Ch. 100; S.C. on

appeal, [1895] 2 Ch. 820.

(6) L. R. 2 Ch. 112.

(7) 44 Ch. D. 627.

been asked to put too wide a construction on the word "acceptor." It may and probably does include executors and administrators, but we submit that it includes no more. A bill might be given to a devisee of the acceptor, not for the purpose of releasing the debt, but to enable the devisee to sue the personal representatives of the acceptor. Sect. 62, sub-s. 2, does not help the defendants, for it assumes that there may be a holder in due course after renunciation. It is said that according to the old law merchant delivery to any one for the purpose of discharge would be a discharge; but according to Byles on Bills, it must be a delivery to some one liable to be sued on the bill. The old law, however, is excluded by s. 62 of the Act. As to equitable release, in order to get rid of a debt you must prove that it is discharged at law, or that there is an agreement for valuable consideration which prevents it being claimed: *Strong v. Bird*. (1)

Renshaw, Q.C., in reply.

LINDLEY L.J. This was an action by the administratrix of a creditor against the executors and devisees of his debtor for the administration of his real and personal estate and for payment of 200*l.* and interest. On August 1, 1865, Walters borrowed 200*l.* from Edwards and gave him a promissory note for the amount. [His Lordship read the note.] It is to be observed that the note was not negotiable when made, not being payable to order or bearer; but s. 8, sub-s. 4, of the Bills of Exchange Act, 1882, appears to apply to it and to make it negotiable after that Act came in force. Walters, the maker of the note, died in 1866; the defendants are his legal personal representatives and the devisees of his real estate. By his will he charged his real estate with his debts. In October, 1894, Edwards, the creditor, died, and the plaintiff is his administratrix with his will annexed. The 200*l.* has never been paid, and Walters' legal personal representatives have no personal assets with which to pay it. Whether they ever had I do not know. Interest on the debt was paid by Walters' devisees to Edwards up to 1889; the last payment was made within six

C. A.
1896
EDWARDS
v.
WALTERS.

C. A.
 1896
 EDWARDS
 v.
 WALTERS.
 Lindley L.J.

years before the commencement of this action. If this were all, the devisees of Walters' real estate would have no defence to the action. But they contend that Edwards in his lifetime released the debt. What he did was this. In April or June, 1891, he gave the note to Mrs. Evans, who was one of the devisees, telling her in effect that he never should make any claim under it and that she might keep it. Mrs. Evans has kept it from that time until now. The note was not indorsed to her, nor was there any writing at the time throwing any light on this transaction. What, then, is the effect of this transaction? It is contended that it is a release at law, or at all events in equity.

A release at law is sought to be established by the law merchant apart from the Bills of Exchange Act, and if not by the law merchant, then by s. 62 of that Act. The law merchant is stated in *Foster v. Dawber*. (1) I do not understand that it applied to bills or notes not negotiable; but this difficulty is removed by s. 8, sub-s. 4, to which I have already alluded. The law merchant is adopted with modifications in s. 62 of the Bills of Exchange Act. The modification introduced is the necessity for a writing unless the bill is given up to the acceptor. In this particular the law merchant is inconsistent with the express provisions of s. 62. The appellants' argument, based on s. 97, sub-s. 2, and on the law merchant, which before the Act formed part of the common law of England, cannot be supported. Reliance is then placed on s. 62 of the Act. This section, though in terms applicable to bills of exchange, is by s. 89 made applicable to promissory notes and to promissory notes payable to a particular person without the addition of the words "or order or bearer": see s. 8, sub-s. 4. Sect. 62, therefore, applies to the promissory note which is in question here. The maker of a promissory note corresponds with the acceptor of a bill (s. 89, sub-s. 2). A promissory note payable on demand is payable at once without any demand, and may be sued upon accordingly. Such a note, therefore, "matures" within the meaning of s. 62 as soon as the note is made and delivered to the payee (see *In re George*. (2)) I will now

(1) 6 Ex. 839.

(2) 44 Ch. D. 627.

paraphrase s. 62, and apply it to a promissory note payable on demand. The section will run thus: "When the holder of a promissory note payable on demand absolutely and unconditionally renounces his rights against the maker the note is discharged. The renunciation must be in writing unless the note is delivered up to the maker." In the present case there was no renunciation in writing. Can it then be said that it was delivered up to the maker? The maker had long been dead; but I am [not prepared to say that the legal personal representatives of an acceptor or maker would not be included in the word "acceptor" or "maker." The ordinary use of language and the general understanding of business men as well as of lawyers warrant such an interpretation of the word acceptor or maker in such a context. As Lord Macclesfield said in *Hyde v. Skinner* (1), "the executors of every person are implied in himself": Byles, 11th ed. p. 53. But I cannot go further and say that acceptor or maker in this section means or includes a legatee or devisee. Such an interpretation is not warranted either by the ordinary use of language or by the general understanding of business men or of lawyers. Consequently, s. 62 does not justify the contention that this note was discharged by the gift of it to Mrs. Evans.

In the course of the argument I expressed a doubt whether, as the plaintiff was not the holder of the note, she could sue the maker's representative either on the note or for money lent to the maker: see *Crowe v. Clay* (2); but as the devisees themselves hold the note and are not liable to be sued upon it by any one, the reasoning on which that case was decided does not apply. I come, therefore, to the conclusion that there has been no release or discharge at law of the debt due to Edwards' estate from Walters' estate. The defence founded on the Statute of Limitations fails as regards the devisees of the real estates by reason of their payment of interest: see *In re Hollingshead*. (3)

There remains only the question whether the devisees of the real estate have been discharged in equity though not at law.

(1) 2 P. Wms. 196.

(2) 9 Ex. 604.

(3) 37 Ch. D. 651.

C. A.
1896
EDWARDS
v.
WALTERS.
Lindley L.J.

C. A.
1896
EDWARDS
v.
WALTERS.
Lindley L.J.

Edwards in his lifetime made no claim against Walters' executors; but there is no evidence to shew that the devisees have been prejudiced by the mode in which the personal estate has been dealt with; there is no evidence that there was any. Moreover, the devisees for many years paid interest on the 200*l.*, and, apart from the gift of the note to Mrs. Evans, there is no ground for saying that Edwards so conducted himself as to render it inequitable on his part to insist on payment of his debt out of the real estate devised to those who recognised his demand. The gift of the note to Mrs. Evans is unquestionably strong evidence of an intention to forgive the debt; but unfortunately the note was not indorsed by the payee. Mrs. Evans could not, therefore, sue on it in her own name, nor was there any consideration for the transaction: no consideration to support an agreement not to sue. There is, in fact, nothing except an intention not carried out. Such an incomplete transaction does not amount to a gift of the debt nor to an equitable release of it. In *Taylor v. Manners* (1) Turner L.J. expressed a doubt whether a gift by a secured creditor of his security to the debtor might not amount even at law to a release of the debt, if such was the intention of the creditor; but I confess I cannot adopt this suggestion. Turner L.J. came to the conclusion that there was an agreement to release, and a consideration for such agreement. Knight Bruce L.J. differed. The decision, therefore, does not really assist the plaintiff. At law exoneration before breach need not be under seal; but a release must be under seal except in the cases provided by s. 62 of the Bills of Exchange Act. A release in equity is often spoken of as something easy to establish. But I am not aware of any circumstances which amount to a release in equity and not at law except an agreement for valuable consideration to give a release or not to sue. Such an agreement, unless there is some reason for not enforcing it, has in equity the effect of a release. Again, a creditor may so conduct himself as to preclude himself from obtaining equitable relief and even from enforcing a legal demand. This I understand to have been Turner L.J.'s meaning when he said (2) he was not satisfied that there might not

(1) L. R. 1 Ch. 48.

(2) L. R. 1 Ch. 56.

be considerations which would in this Court prevent a debt from being enforced, although it might be subsisting at law. But to call such conduct a release in equity suggests false analogies and misleads. In this case there is no release or discharge at law or in equity, and no conduct on the part of Mr. Edwards which precludes his representatives from obtaining payment from the devisees. An intention to discharge them from their liability is established; but that unfortunately is insufficient to afford them a defence to the claim made against them. A Court of Equity cannot enforce a mere intention to give or to forgive. The appeal must be dismissed with costs.

C. A.
1896
EDWARDS
v.
WALTERS.
Lindley L.J.

LOPES L.J. I will not recapitulate the facts which have been already stated. This note is payable to a person designated without the addition of "or order" or "bearer," and would not have been negotiable before the statute of 1882. The old law therefore, as stated by Byles J. in his book on Bills, would have been inapplicable, and the defendants would have had no answer. It was contended that the statute of 1882 did not apply, because this note was not a negotiable instrument; but this contention cannot be maintained. If s. 8 of the statute, s. 83 (which refers to a note, and clearly covers a note made payable to a specified person), and s. 89 are looked at, this note is a negotiable instrument. It is therefore within the statute, and the case appears to me to be entirely governed by s. 62. Under s. 62, for a renunciation to be effectual the note must be mature. A note such as this—a note payable on demand—is at maturity immediately it is made, and therefore that portion of the section is complied with. The holder here, in my opinion, has by parol absolutely and unconditionally renounced his rights against the acceptor, or in this case the maker. But the statute says that the renunciation must be in writing unless the bill or note is delivered up to the acceptor, or in this case the maker. There was no writing in this case—that is perfectly clear; and the bill was not delivered up to the acceptor, or in this case to the maker. It was delivered up to the devisees of the maker, who were no parties to the note and could not have been sued on it. I am clearly of opinion that this is not either within the words

C. A.
1896
EDWARDS
v.
WALTERS.
Lopes L.J.

or the meaning of the statute. It may be that the word "acceptor" or "maker" would include any person liable on the bill or note—such, for instance, as the personal representatives of the acceptor or maker; but I am quite clear that it cannot include the devisees of the maker, or make the estate of the testator liable. With regard to the Statute of Limitations, the case is taken out of that statute by the payments made by the devisees. There has been no release at law in my opinion, and for the reasons already given by Lindley L.J. no discharge in equity. The appeal must, therefore, be dismissed with costs.

KAY L.J. The administrator of a man named Edwards has brought this action against the executors and against the devisees of real estate of a person named Walters to recover a sum of 200*l.* lent in 1865 by Edwards to Walters. Walters died in 1866. By his will he charged his real estate with payment of his debts. His executors were ignorant of the existence of this debt, and have completely administered his personal estate; but the devisees of the real estate of Walters paid interest upon the debt for some years and up to 1889.

The defence is that the debt has been released.

It appears that Walters gave a promissory note to Edwards for the amount, and that in April or June, 1891, Edwards gave up to the devisees the promissory note with the intention of releasing the debt. The learned judge has found this to be the fact, and there seems no reason to doubt it.

The question is whether this operated as an effectual release at law or in equity.

By the Bills of Exchange Act, 1882, s. 62, "When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."

By s. 89, the provisions of the Act apply with the necessary modifications to promissory notes. Therefore, in s. 62 we must read in this case "maker" instead of "acceptor." The difficulty is to say that this note has been delivered up to the maker. The actual maker, of course, was Walters, and it was not

delivered up to him; but if it had been delivered up to his executors after his death, I should think that would do, because they might have been sued on the note as standing in the place of the maker. The devisees of his real estate are not in the same position as his executors for this purpose. There is nothing in the Act to bring them within the definition of makers of the note. They might be joined with the executors in an action to make the real estate which they took under the will of the maker of the note liable for its payment, as has been done in this case. Payment on account by them would keep this right against the real estate alive, as was determined in the case of *Roddam v. Morley* (1) and in *In re Hollingshead*. (2) But these considerations do not authorize the Court to say that the devisees of the real estate of the maker are themselves makers within the meaning of s. 62 of this statute, or that they stand in the position of the deceased maker, as his executors may be said to do.

Before the statute, the liability of any party to the note might be discharged by an express renunciation without writing and without consideration. This was by the law merchant: *Foster v. Dawber* (3); but it only applied to those who were parties to the note. The statute has altered this by requiring the renunciation to be in writing. I have no doubt that, if the renunciation was made as required by the Act, the debt would be completely discharged, and no action could be maintained on the note or to recover the loan.

It is argued that the case does not come within the Act at all; that the renunciation contemplated by the Act is only against the maker; and if these defendants are not makers, the matter may be treated as outside the statute, and that the loan has been effectually released as far as they were concerned. The only authority cited for this was a case of *Taylor v. Manners* (4), where Turner L.J. intimated rather doubtfully an opinion that the giving up of a policy of insurance which was the security for a debt might operate as a total release of the debt. Knight Bruce L.J. dissented. I do not see how this

C. A.
1896
EDWARDS
v.
WALTERS.
Kay L.J.

(1) 1 De G. & J. 1.

(2) 37 Ch. D. 651.

(3) 6 Ex. 839.

(4) L. R. 1 Ch. 48.

C. A.
1896
EDWARDS
v.
WALTERS.
Kay L.J.

could be a release in equity unless there was a valuable consideration for the release, and no case has been cited in which such a transaction has been held to be a release at law.

Then it was said that no one could sue for the debt in this case unless he was in a position to hand over the note to the defendants; and that would undoubtedly be so if there was any chance of the defendants being exposed to the risk of being sued upon the note by the holder. But no such danger can possibly arise, because the note is in the defendants' own hands.

With every desire to assist the defendants in a case in which it seems clear that the payee of the note intended to release all claim against them, I feel bound to hold that he has not carried out that intention effectually. He might have made the renunciation in writing—in which case I incline to think it would have been sufficient. He has not done this. He has made an attempt to give up the claim, which, being without consideration and not complying with the statute, in my opinion has not discharged the real estate devised to these defendants from liability.

Solicitors: *Minshall, Parry-Jones & Co., for Smith & Davies, Aberystwith; Robbins, Billing & Co., for C. Owen, Pwllheli.*

H. C. J.

In re HANCOCK.
MALCOLM *v.* BURFORD-HANCOCK.

[1895 H. 3751.]

C. A.
1896
KEKEWICH
J.
Feb. 13.
C. A.
May 2, 4.

Power—Exercise—Power to Husband by Deed or Will to Appoint Income to “his Wife”—Appointment by Husband to his then Wife—Subsequent Appointment in favour of his Second Wife.

By a post-nuptial settlement power was given to a husband by deed or deeds to appoint a fund, after the determination of his own interest therein, amongst his children, subject to a proviso empowering him by deed or will to appoint one-fourth of the income to “his wife” for her life. The husband in exercise of these powers by deed irrevocably appointed one-fourth of the income in favour of his then wife for her life, and, “subject and without prejudice to the trust” in her favour “thereinbefore limited, if the same should take effect,” he appointed the fund amongst his two daughters (who were adults) and his one son (who was under age) in equal thirds, reserving, as to his son, a power of revocation which he subsequently exercised by irrevocably appointing one-third of the fund to such son absolutely. The then wife afterwards died; the husband married again; and on his second marriage he purported by deed irrevocably to appoint one-fourth of the income of the fund to his second wife during her life:—

Held, by the Court of Appeal (affirming the decision of Kekewich J.), that the appointment of income in favour of the second wife was ineffectual.

APPEAL from Kekewich J.

By an indenture of settlement dated March 13, 1872, a moiety of 28,000*l.* 3*l.* per cent. Consols, together with other property, was vested in trustees upon trust to invest as therein mentioned, and to pay the income to Sir Henry J. B. Burford-Hancock until he should die or be outlawed or declared bankrupt, or should assign, charge, or incur, or attempt, or affect to assign, charge, or incur the said annual income, or some part thereof, or should do or suffer something whereby the same or some part thereof might, if belonging absolutely to him, become vested in or payable to some other person or persons, and after the determination of the trust thereinbefore declared in favour of Sir Henry Hancock, upon trust for all or such one or more exclusively of the other or others of his children at such age or time, or respective ages or times, if more than one, in such shares, and with such future, or executory, or other trusts

C. A.
1896
In re
HANCOCK.
MALCOLM
r.
BURFORD-
HANCOCK.

for the benefit of the said children, or some or one of them, and upon such conditions, with such restrictions and in such manner in all respects as Sir Henry Hancock should by any deed or deeds, with or without power of revocation and new appointment, appoint; and after usual provisions in default of appointment, and advancement, maintenance, and accumulation clauses, the settlement contained a proviso that it should be lawful for Sir Henry Hancock by deed, or by will or codicil, to appoint that after his own death or the determination of the trust thereinbefore declared in his favour, one-fourth part of the annual income should be paid to "his wife" for her life, or for any less period, and upon such conditions and with such restrictions as he should think fit. At the date of this settlement Sir Henry Hancock was married to his first wife.

By a deed-poll, dated January 26, 1885, Sir Henry Hancock, in exercise of the powers given to him by the indenture of 1872, absolutely and irrevocably appointed that, subject and without prejudice to and from and after the determination of the trust by that indenture declared in his favour in the income of the trust premises, if at the determination of the last-mentioned trust the then Lady Hancock should be living, there should be paid to her during the remainder of her life one equal fourth part of the income arising from the trust premises; and in exercise of the powers given to him by the same indenture, and of all other powers (if any) enabling him, he thereby appointed that, "subject and without prejudice to, and from and after the determination of the said trust by the said indenture declared" in his favour in the income of the trust premises, "and subject also and without prejudice to the trust in favour of" the then Lady Hancock "thereinbefore limited and declared (if the same should take effect)," the trust premises should be held in trust for his two daughters and one son in equal thirds; but as to the son's share, it was declared that it should be lawful for Sir Henry Hancock at any time or times, by deed or by will or codicil, wholly or partially to revoke the appointment thereinbefore expressed to be thereby made in favour of the son.

At the date of this deed-poll Sir Henry Hancock had three children living, namely, two daughters and a son. The two

daughters had attained the age of twenty-one, but the son was under that age.

By deed-poll dated December 27, 1892, Sir Henry Hancock revoked the appointment of the one-third share appointed by the deed of 1885 in favour of his son, and in lieu thereof, he thereby, under, or by virtue of the powers given him by the indenture of 1872, absolutely and irrevocably appointed, but subject and without prejudice to his life interest and the life interest of the then Lady Hancock in one-fourth of the income of the trust funds in the indenture of 1885 mentioned, that the trustees or trustee should stand possessed of the same one equal third part in trust for his son absolutely.

The first Lady Hancock died on December 25, 1893.

In March, 1895, Sir Henry Hancock was married to his second wife, the present Lady Hancock, and on the occasion of that marriage, by a deed-poll dated March 23, 1895, and expressed to be supplemental to the deed-poll of January 26, 1885, he purported, in exercise of the power given to him by the indenture of 1872, to absolutely and irrevocably appoint that after the solemnization of the marriage, and subject to the trust by the indenture of 1872 declared in his favour, one equal fourth part of the income arising under that indenture should be paid to the second Lady Hancock during her life.

Sir Henry Hancock died on October 23, 1895.

This was an originating summons taken out by the existing trustees of the settlement of 1872, as plaintiffs, against the present Lady Hancock and the persons beneficially interested under the appointment of 1885 as defendants, asking, inter alia, for the determination by the Court of the question whether or not the deed in favour of the defendant, the present Lady Hancock, made on March 23, 1895, was a valid appointment of the one-fourth part of the income, and ought to be given effect to by the plaintiffs as trustees.

The summons was heard before Kekewich J. on February 13, 1896.

C. E. E. Jenkins, for the plaintiffs, the trustees of the settlement, stated the case.

C. A.
1896
~~~~~  
*In re*  
HANCOCK.  
MALCOLM  
*v.*  
BURFORD-  
HANCOCK.  
—

C. A.  
1896  
~  
*In re*  
HANCOCK.  
MALCOLM  
v.  
BURFORD-  
HANCOCK.  
—

*Austen-Cartmell*, for the present Lady Hancock. The appointment in favour of Lady Hancock by the deed of 1895 is good, notwithstanding the previous appointment by the deed of 1885 in favour of the late Lady Hancock and her children. The power given by the settlement of 1872 to appoint income to a wife is a power overriding the interests of the children under the settlement, and there was nothing in the deed of 1885 amounting, either expressly or by implication, to a release of the power under s. 52 of the Conveyancing Act, 1881, or otherwise. Consequently, after the execution of that deed Sir Henry Hancock still retained power to interpose, before the interests of the children, a limitation of one-fourth of the income in favour of any future wife. There is no authority directly in point; but the powers conferred by the settlement of 1872 are closely akin to the powers of jointuring and charging portions usually inserted in settlements of real estate, and it has always been held that a power of jointuring overrides a power to charge portions: Sugden on Powers, 8th ed. pp. 484, 490.

[KEKEWICH J. That is settled law; but other considerations apply to powers of that kind, which operate to create charges upon settled land.]

The appointments to the children by the deed of 1885 were substantially in the nature of portions by a division of the settled fund among them in a particular way. The words "subject and without prejudice to the trust in favour of" the first Lady Hancock are merely descriptive of the effect of the appointment. Having made the previous appointment, Sir Henry could not appoint to the children in any other way.

For purposes of construction, the several appointments ought to be read into the settlement of 1872; and if the appointment of 1895 is so read it must, operating as it does under an overriding power, take effect in priority to the interests of the children. Supposing there had been no wife living when the appointment of 1885 was made, and it had simply been to the children, subject to their father's interest, it can hardly be doubted that the appointment of 1895, under the independent and overriding power, would have been effectual.

*Renshaw, Q.C.*, and *Ingle Joyce*, for the persons interested

under the appointment of 1885. By the appointment of 1885 Sir Henry Hancock precluded himself from further exercising the power to appoint income in favour of a wife in the same way as by the irrevocable appointments in favour of his children he precluded himself from further exercising the power to appoint capital. We do not contend that the power to appoint income was released; we should say rather that it was extinguished. The terms of the appointment of 1885 are express. The appointment to the children is made subject, and subject only, to the interests of their father and mother. There is no reservation of any power in the future, though it would have been perfectly easy to have said that the appointment was to be subject to any exercise of the power in favour of a future wife. Under the appointment to the children, according to the plain terms of the deed of 1885, it was competent for them to deal with their shares in any way they pleased, subject only to the interests of their parents. The general principle which the Court ought to apply is that "it is not permitted to a man to defeat his own grant": see Farwell on Powers, 2nd ed. pp. 15, 16, quoting the language of Sir John Leach in *West v. Bernery* (1), and referring to *Smith v. Death* (2); *King v. Melling* (3); *Coffin v. Cooper* (4); *Bickley v. Guest*. (5) If the donee of a general power of appointment and of a special power to appoint to children makes an appointment under the special power, he cannot afterwards exercise the general power, and so destroy his own appointment. The authorities as to the law of real property have no application. This is not a case of portions or of successive limitations, but merely of the exercise of powers under an ordinary settlement providing for division of personal property. The power to appoint income to a wife does not override the power to appoint capital to children. The two powers are concurrent, and the appointments made under them confer present interests at the same moment, namely, the death of Sir Henry Hancock.

*Austen-Cartmell*, in reply, referred to *Isaac v. Hughes*. (6)

(1) 1 Russ. & My. 431, 435.

(2) 5 Madd. 371.

(3) 1 Vent. 225.

(4) 2 Dr. & Sm. 365.

(5) 1 Russ. & My. 440.

(6) L. R. 9 Eq. 191.

C. A.

1896

*In re*

HANCOCK.

MALCOLM

v.

BURFORD-  
HANCOCK.

KEKEWICH J., after dealing with other questions, and stating that, in his opinion, the power to appoint income in favour of a wife extended to a future wife, continued as follows :—

There remains a much more difficult question arising under the deed of appointment of January 26, 1885. At that time the first Lady Hancock was living, and Sir Henry Hancock had three children by her. By the deed he exercised both of the powers conferred by the settlement of March 13, 1872, by appointing, subject to his own interest, one-fourth of the income to the first Lady Hancock for her life, and then proceeding to appoint the fund amongst the children. As regards one of the children, he reserved a power of revocation; but by a subsequent deed that appointment was made irrevocable, and I may, therefore, treat the appointment of 1885 as being irrevocable as regards all the children. [His Lordship then referred to the terms of the deed of 1885, as above set out, and to the subsequent appointment in favour of the second Lady Hancock, and continued as follows :—]

The question, then, is whether the appointment to the second Lady Hancock is effectual; and the argument on her behalf is that the power given by the settlement to appoint a share of income to a wife overrides the power thereby given to appoint in favour of children, and that, for purposes of construction, the appointments made in exercise of these powers ought to be read into the settlement of 1872; and it is accordingly contended that under the deed of 1885 the children must be held to have taken subject to the future exercise of the overriding power, and, therefore, in the events which have happened, subject to the appointment made by the deed of 1895. In support of that argument reference is made to the law of real property as regards powers of jointuring and charging portions, which, as Mr. Cartmell correctly said, are somewhat akin to the powers conferred by the settlement of 1872. I do not, however, think that it would be right to decide this case upon any analogy of that kind, because it seems to me that there is another principle which I ought to apply. Nothing would have been easier than for the appointor by the deed of 1885 to have saved, by express words, his right to exercise the power of



appointing income in favour of an after-taken wife. By the deed of 1885 he makes an express appointment in favour of the first Lady Hancock, and he makes an appointment in favour of his children subject to that express appointment. It is true he does not expressly say that it is to be subject only to that; but he does not specify anything else to which it is to be subject. It is said that there is nothing in the deed of 1885 which amounts to a release, express or implied, by Sir Henry Hancock of his power to appoint income to a future wife. I do not think that is the right way of putting the point, and it is not in fact so put on behalf of the children; but what is said is that I ought to apply the principle that a man cannot be allowed to derogate from his own grant. That principle is as applicable to an appointment as to any other form of grant, and the application of it is illustrated by the cases which have been referred to by Mr. Renshaw. It is true that the deed of appointment of 1885 was, as has been said by Mr. Cartmell, merely a division of the fund among the children; but it was an irrevocable division among them for their benefit in a particular way, and according to the plain terms of the deed there was nothing to prevent them from mortgaging, charging, settling, or otherwise dealing as they thought fit with their shares in the capital fund, subject only to the prior interests of their father and mother. It seems to me that I should be departing from the principle to which I have referred if I held that it was competent to Sir Henry Hancock, after having made that disposition in favour of his children, subject only to the limitations specified by him, afterwards to interpose a limitation in priority to their interests so as to postpone them by reason of a subsequent event. On those grounds I think that the claim of the present Lady Hancock fails, and that there must be a declaration that the appointment of 1895 was ineffectual.

C. C. M. D.

The second Lady Hancock appealed. The appeal came on for hearing on May 2, 1896.

*Farwell, Q.C.*, and *Austen-Cartmell*, for the appellant. The power given to Sir Henry Hancock by the proviso in the

C. A.

1896

*In re*

HANCOCK.

MALCOLM

v.

BURFORD-  
HANCOCK.

Kekewich J.

C. A.  
1896  
In re  
HANCOCK.  
MALCOLM  
v.  
BURFORD-  
HANCOCK.  
—

settlement of 1872 was a power by deed or will to appoint certain income to "his wife" during her life. There is nothing whatever to shew any intention to confine the exercise of this power to an appointment in favour of the lady who was then his wife, and the power, the exercise of which can only take effect after his own death or the determination of the trust in his own favour, should be construed to include as its object "any wife" that Sir Henry might have. Thus the ineffectual exercise of the power by the first appointment did not exhaust it, and the appointment in favour of the second Lady Hancock is good. A power of appointing a life interest to a wife like this is on all-fours with a power of jointuring, and, notwithstanding an irrevocable appointment of a portion to a child, powers of sale and leasing can be exercised, and so can powers of jointuring which are to be preferred to all other powers.

[They cited Co. Litt. 272 (Butler's note); Sudgen on Powers, 8th ed. 489; Sanders on Uses, 5th ed. 175, 176; *Hervey v. Hervey* (1); *Zouch v. Woolston* (2); *Reynolds v. Meyrick* (3); *Mosley v. Mosley* (4); and *Maultby v. Maultby* (5), and distinguished *In re Parrott* (6); *Smith v. Death*. (7)]

In other respects their arguments were similar to those addressed on behalf of the appellant to the Court below.

*Renshaw, Q.C.*, and *Ingle Joyce*, for the respondents, were not called upon.

*C. E. E. Jenkins*, for the trustees of the settlement.

LINDLEY L.J. The case is one which admits of argument, and has been argued, and exceedingly well argued, by Mr. Farwell and Mr. Cartmell; but, after all, there is such a thing as common sense in the construction of a power, and it strikes me that common sense will enable us to see our way on the present occasion. The case stands thus. [His Lordship then stated the indenture of settlement of March 13, 1872, and continued:—]

The subject-matter of that settlement was money. At the

(1) 1 Atk. 561, 567.

(2) 2 Burr. 1136.

(3) 1 Eden, 48.

(4) 5 Ves. 248.

(5) 2 Ir. Ch. Rep. 32.

(6) 33 Ch. D. 274.

(7) 5 Madd. 371.

date of it Sir H. J. Burford-Hancock was married to his first wife, and had certain children ; but the children in favour of whom he had the power of appointment were not necessarily his children by his then wife ; and if she had died and he had married again, I do not doubt that the power of appointment would have been exercisable in favour of any of his children.

Now the first question which arises is, what is the meaning of the proviso that it shall be lawful for Sir Henry Hancock by deed, will, or codicil to appoint that after his own death or determination of the trust in his favour one-fourth part of the annual income shall be paid to “ his wife ” ? Does that extend to any wife that he might have, or is it confined to the one which he then had ? It is most important to observe that this is not only a power to appoint by will to his widow. It is a power to appoint by deed or will to his wife, the events contemplated being not only that of his death, but another event, that is, his bankruptcy or attempt to dispose of his property—in which case his power to appoint to his wife takes effect. This has been likened to a power to jointure ; but a power to jointure is different, because it applies to a widow—and this is something more. I think by wife is meant his then wife. I feel that very strongly ; but it is possible by the exercise of a certain amount of ingenuity to throw a doubt on that, not in the events which have happened, but in events which might possibly happen. Therefore I go on and assume that the clause means something more than I think it does, and that under it, in some conceivable circumstances, another wife might take.

We will go on and see what has been done. On January 26, 1885, a deed of appointment was executed by Sir Henry by which, after referring to the settlement of 1872 and saying that he is desirous of making such appointment as thereafter mentioned, he absolutely and irrevocably appointed that, subject and without prejudice to, and from and after the determination of, the trust by the said indenture of settlement declared in his favour in the income of the trust fund, if at the determination of the last-mentioned trust his wife Hannah, Lady Hancock, should be then living, there should be paid to her during the remainder of her life one equal fourth part of the income of

C. A.  
1896  
*In re*  
HANCOCK.  
MALCOLM  
v.  
BURFORD-  
HANCOCK.  
—  
Lindley L.J.  
—

C. A.

1896

*In re*

HANCOCK.

MALCOLM

v.

BURFORD-  
HANCOCK.

Lindley L.J.

the fund. That is to say, he irrevocably appoints to his then wife and makes a provision for her for life. Then comes another witnessing part, which is an appointment "subject and without prejudice to and from and after the determination of the said trust by the said indenture declared" in his favour in the income of the trust fund, and "subject also and without prejudice to the trust in favour of" his said wife under the appointment which he had just made to his children. There is not a word there as to any reservation of any power on his part to appoint to any after-taken wife. There is no reason to suppose that he thought of such a thing; and accordingly the deed ends there, except as to the reservation of a power to revoke the share of one of the children. This, then, is an absolute appointment in 1885 to his then wife and his children in the manner I have mentioned. Now, what is the effect of that? Could he after that, without having signified any intention whatever of altering that disposition, make another appointment to another wife, substituting, so far as his existing children are concerned, a young life in front of them instead of the life of their own mother? The effect would be very startling as far as they are concerned. They might naturally think that they were provided for subject only to the life interests of their father and mother, whereas, if it was competent for their father in the event of the death of their mother to make a provision for another wife who might be a very young woman, their position would be an entirely different one.

Now, Hannah, Lady Hancock, died in 1893, and in March, 1895, Sir Henry Hancock married again, and made an appointment in favour of his second wife. That was done by a deed which was expressed to be supplemental to the two deeds-poll of January 26, 1885, and December 27, 1892.

Now comes the question: Assuming, as I do for the present purpose, that the word "wife" in the original settlement of 1872 was not confined to the then Lady Hancock, as I have said I think it is, was it competent for Sir Henry Hancock to make this last appointment? This is said not to be to the prejudice of the children, and it is very ingeniously argued that it is an elementary principle of conveyancing law as



applied to powers to read the instrument which exercises the power into the instrument which created it, and that if the appointment of January, 1885, is read into the settlement of March, 1872, it will be seen that the proviso in favour of the wife is consistent with what has been done by the donee of the power. But it appears to me, I confess, that what we are really asked to do is to construe the two deeds without regard to the manifest intention of the appointor in executing the deed of January, 1885. That is where the formidable difficulty appears to arise. We are asked to do that which was never dreamt of by anybody, and to treat with gross injustice the children who have, of course, acted on the faith that they had been provided for by the appointment of January, 1885. I dare say that Lady Hancock may be disappointed, and that she has been led to suppose that the appointment in her favour was good; but if you look at the matter all round, it is inconsistent with the intention of the appointor to read these deeds in such a manner as to uphold the second, and I do not think that any technical law would bind us to do it. If a technical answer to the argument I am considering is wanted it is to be found in the doctrine laid down in Mr. Farwell's book on Powers, 2nd Ed., p. 15: "All powers, other than powers coupled with a trust or duty, may be suspended or destroyed, either wholly or in part, by the donees thereof." And at page 16 he says that, "The rule applies to limited powers, e.g., powers in favour of a wife or children"; and to powers exercisable by deed or will. Then he says that any dealing with the estate inconsistent with exercise of the power must put an end to it.

Now what was done in January, 1885, was inconsistent with any intention on the part of the appointor, and with good faith, to appoint to anybody else other than those for whom he was then providing. He was not doing a dishonest thing, but an honest thing, and never dreamt of altering his mind. He exercised his power and exhausted it, and intended to do so. The appeal must be dismissed with costs.

LOPES L.J. After the very able argument I have listened to perhaps it is presumptuous in me to say that I have no doubt

C. A.  
1896  
*In re*  
HANCOCK.  
MALCOLM  
v.  
BURFORD-  
HANCOCK.  
Lindley L.J.

C. A.  
 1896  
*In re*  
 HANCOCK.  
 MALCOLM  
*v.*  
 BURFORD-  
 HANCOCK.  
 ———  
 Lopes L.J.  
 ———

of the way in which this case should be decided. But why should we not give effect to the words according to their ordinary and true meaning, notwithstanding that they may be contained in a deed or a power of appointment? I have often thought that Courts of Equity, pace my learned brothers Lindley and Kay, are disposed to refine more than necessary, and that they have sometimes overlooked the ordinary common sense and meaning of words when they occur in deeds. Now, to take the deeds which are before us in this case. I will refer to them at some length, because I entertain a strong view upon the question. [His Lordship then stated the facts of the case, and continued :—]

The question is whether the appointment in favour of Sir Henry's second wife was valid or not—whether the power of appointing in favour of Sir Henry's wife was strictly in favour of his then wife ; in other words, whether it was not so restricted as to be exhausted by the appointment in favour of Sir Henry's first wife. It is said that the power of appointment to his wife included any wife. Now, the Court is entitled to regard the state of things existing at the time of the execution of the deed. Sir Henry was then married, and in my judgment the wife contemplated and intended was the existing wife, and none other. If not, it would include any number of wives, the interest of the children would be indefinitely postponed, and it would be only competent for them to deal with their vested interest subject to contingencies the extent of which could not be calculated. If Sir Henry exercised the power of appointment in favour of the first wife, speaking for myself I should have thought it was so in favour of that wife that he could not have exercised it in favour of any other. It is a question of construction, and I can only thus construe the power. To hold it could be exercised toties quoties would be most unjust to the children, and I cannot find anything in the deed to justify it. The appointment to the children and wife are made at the same time, and I observe that Sir Henry Hancock never intended to reserve to himself a power to defeat a grant made to his children. But assuming that I am wrong in that construction of the deed, I think he has exercised the power in favour of the

first wife, and, in my judgment, the power is thereby exhausted, and the appeal should be dismissed.

C. A.

1896

*In re*

HANCOCK.

MALCOLM

v.

BURFORD-  
HANCOCK.

KAY L.J. The deed of March 13, 1872, seems to have been a post-nuptial settlement; by it certain funds, consisting of 28,000*l.* Consols, were settled upon certain trusts, and the deed contained, besides the power of appointment in favour of the children of Sir Henry Hancock, the settlor, a power by way of proviso of appointing by deed or will, after his own death or the determination of the trusts thereinbefore declared in his favour, one-fourth part of the annual income to his wife for life. Now at the time of this deed he was married and had a wife, and the first question that arises is whether the power of appointing to his wife for life means to any wife which he might have, or only to a wife which he had at the date of the deed. As has been already observed, it is not a power to appoint to his widow, or to appoint after his death a life interest to a wife, but a power to appoint after his death or after the determination of the interest thereby reserved to himself. He had reserved a life interest to himself by this deed, and that life interest was determinable in the case of bankruptcy, or alienation, or other events; and therefore it is that this power to appoint to a wife is by deed as well as by will, and to take effect on the determination of that life interest.

I do not pause now to inquire whether the mode of limiting the life interest was applicable to a case of bankruptcy, because no bankruptcy happened, and the question does not now arise. What occasions the first question of some difficulty upon this deed is whether those words, "his wife for her life," can *primâ facie* mean anything but the wife to whom he was then married. It is absolutely necessary for the Court in construing a deed of this kind to pay regard to the state of things existing at the time. And the thing most material as far as this point is concerned is the fact of Sir Henry having then, at the date of the deed, a wife, and that in the exercise of this power he does not refer to "any wife," or to the widow whom he might leave, which of course would be susceptible of a different construction, but that he refers only to "his wife." I feel a

C. A.  
1896  
*In re*  
HANCOCK.  
MALCOLM  
v.  
BURFORD-  
HANCOCK.  
—  
Kay L.J.  
—

difficulty in saying absolutely that that might not mean, not only the wife he had at the time, but some one whom he might marry after the death of that wife. Supposing it to happen that he had made no appointment in favour of the wife he had at the time and had married again, and then for the first time exercised his power in favour of his second wife, I do not like to say positively now that such an appointment would be an invalid appointment, which would be the case if we were to read the words "his wife" as referring only to the wife he had at the date of this deed. I feel that the question is of some difficulty and doubt; but I incline to think the proper mode of construing this deed is to treat it as referring to the wife that he then had, and not so as to include any wife whom he might afterwards marry. I will assume, however, that any wife whom he might afterwards marry might come within the terms of this power which is inserted by way of proviso. What are the facts? While his first wife was still living, Sir Henry by deed-poll in 1885 made what he calls on the face of the deed an irrevocable appointment in favour of his wife for her life, and after her death for his children. Now, suppose any child on the faith of that had settled, or dealt with his share, it would be an extraordinary hardship on that child to say that now Sir Henry has married again, although he has exercised his power in favour of his first wife, that did not exhaust the power, and he may now exercise it again in favour of his second wife, and thereby postpone his children to a wife who may have a young life, which may last a great many years after his own death. That would be a very hard thing indeed on the children who had relied on the terms of this appointment as giving them an absolute vested and irrevocable interest. Such an appointment would be pro tanto a revocation of that appointment. Was that the meaning of the deed of appointment? I cannot satisfy my mind that it was. It is said that you ought to read this appointment into the original settlement, and in this order, that the appointment to the second wife should come before the appointment to the children. I agree that the rule is so as far as the appointments are valid appointments. But suppose you followed that rule in this case, you would have to read into this



settlement first of all the appointment to his first wife, and then you must read in the appointment to the second wife, not as a remainder after the appointment to the first wife, but as an alternative appointment to the appointment to the first wife. Is that legitimate, and is that according to any rule or practice of the Court in dealing with appointments of the kind? The result would be this—I appoint to my first wife after the determination of my estate, and, if she should not be then living, then I appoint to my second wife after the determination of my estate, and subject to those alternative life interests I appoint to my children. Is that consistent with the appointment which he did actually irrevocably make in favour of his first wife and children? I cannot bring myself to believe that it is; and therefore, even if the first point be as argued in favour of the appellant, that this power of appointment to a wife would extend to any wife, yet, having exercised it in this way by deed in favour of his existing wife and his children, it seems to me entirely contrary to the plain meaning and intention of that deed that he should afterwards, having married again, postpone the interests which he had given to the children by that deed of appointment to the life of another wife, which certainly was not a thing within his contemplation when that deed of appointment was made. I therefore think that the learned judge was right in the decision at which he arrived, and that the first appointment was so complete an exercise of Sir Henry's power of appointment in favour of his wife as to make it impossible for him after that appointment to make an appointment in favour of another wife, which I think would be entirely inconsistent with the terms of that deed of appointment. The appeal therefore fails, and must be dismissed with costs.

Solicitors: *Rowcliffes, Rawle & Co.; H. P. Spottiswoode; J. Rogers.*

W. W. K.

C. A.  
1896  
*In re*  
HANCOCK.  
MALCOLM  
v.  
BURFORD-  
HANCOCK.  
Kay L.J.

CHITTY J.

1896

May 13.*In re* HORNER.  
FOOKS v. HORNER.

[1895 H. 2851A.]

*Covenant to Pay a Sum of Money within Six Calendar Months after Death*  
—Time Certain—Interest—3 & 4 Will. 4, c. 42, s. 28.

A testator covenanted that his executors or administrators should pay a sum of 2000*l.* within six calendar months after his decease. Default was made in payment of the sum at the time named :—

*Held*, that the sum carried interest from the time named to the date of payment; the sum being “payable at a certain time” within the meaning of s. 28 of 3 & 4 Will. 4, c. 42.

*Knapp v. Burnaby* (9 W. R. 765) followed.

## ADJOURNED SUMMONS.

By an indenture dated February 21, 1891, and made between Edward Horner of the first part, C. C. S. Fooks of the second part, and Francis Horner and Francis G. Monkland of the third part, after reciting that C. C. S. Fooks had married Gertrude Elizabeth Horner, one of the daughters of Edward Horner, and that upon the treaty for the marriage Edward Horner had agreed to pay his daughter 100*l.* a year during his life, and that upon his decease a sum of 2000*l.* should out of his estate be held in trust to pay the income thereof to his daughter for life, and after her decease to her husband for life, with remainder to the children of the marriage as therein mentioned, and that the said Gertrude Elizabeth Fooks had died without leaving any child her surviving, Edward Horner covenanted with C. C. S. Fooks and the trustees of the indenture that he would during the joint lives of himself and the said C. C. S. Fooks pay to the trustees 100*l.* a year, and, further, that within six calendar months after his death his executors or administrators should pay to the trustees the sum of 2000*l.*, to be held by them upon trust, that they should stand possessed of the annual income of 100*l.* and of the income of the investments of the 2000*l.* upon the trusts therein declared under which the capital of the 2000*l.* was (subject to the payment of the income to the said C. C. S. Fooks during his life

or until forfeiture) to be held in trust for Edward Horner absolutely. CHITTY J.

By his will, dated January 26, 1893, Edward Horner, after reciting that in each of the settlements made on the marriage of his married daughters he had covenanted to pay to the trustees thereof the annual sum of 100*l.* during his life, and that his heirs, executors, or administrators should within six calendar months after his death pay to them a gross sum of 2000*l.* with interest at the rate of 5*l.* per cent. per annum, to be computed from the date of his death until payment, to be held upon the trusts of such settlements, and that on the marriage of his daughter Gertrude Elizabeth Fooks no settlement had been made by him, but he had promised that notwithstanding that fact it was his intention to make provision for his said daughter, her husband, and children (if any) in the same manner as if there had been a settlement on her marriage, and in the same or the like manner as was provided in the settlements of his other married daughters, and that his daughter having died without leaving any child her surviving, he had executed such a settlement in favour of her husband, he thereby confirmed such settlements respectively, and appointed the defendants executors of his will.

The testator died on September 1, 1894.

On March 1, 1895, the defendants paid C. C. S. Fooks the sum of 50*l.* for interest at 5 per cent. on the sum of 2000*l.* from the date of the death of the testator, under, as they alleged, a mistake, and which they claimed to have returned; but they did not pay the 2000*l.* to the trustees of the deed of February 21, 1891.

On September 20, 1895, a sale of the testator's reversion in the 2000*l.* was completed to the said C. C. S. Fooks, and the sum was handed over to him without prejudice to the question whether any and what interest was payable in respect of the sum.

This was a summons taken out by C. C. S. Fooks for the determination of the question whether any interest was payable out of the estate of the testator in respect of the sum of 2000*l.*, and if so as from what date and at what rate per cent.

1896  
*In re*  
 HORNER.  
 FOOKS  
*v.*  
 HORNER.

CHITTY J. *Stewart-Smith*, for the applicant. The applicant is entitled to interest on the 2000*l.* at 5 per cent. from the expiration of the six months from the testator's death. The six calendar months from the testator's death is a time certain within 3 & 4 Will. 4, c. 42, s. 28: *Knapp v. Burnaby* (1); *Mellersh v. Brown*. (2)

1896  
In re  
HORNER.  
FOOKS  
v.  
HORNER.

*Alfred Adams*, for the defendants. The applicant is not entitled to interest. The death of the testator was an uncertain event. Sect. 28 requires that the time, in order to render interest payable, should be "a certain time": *Merchant Shipping Co. v. Armitage* (3); *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (4)

*Stewart-Smith*, in reply. *Knapp v. Burnaby* (1) was not cited in either *Merchant Shipping Co. v. Armitage* (3) or *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (4), and neither of those cases have any application to the present, as the time for payment was uncertain in both.

CHITTY J. In this case the testator covenanted that his executors or administrators should pay a sum of 2000*l.* within six calendar months after his death, and the question is whether that is a sum "payable at a certain time" within s. 28 of 3 & 4 Will. 4, c. 42, so as to carry interest.

It is argued that the time named is an uncertain time, and therefore that the sum is not payable at a certain time. The point came before Lord Hatherley, when Vice-Chancellor, in *Knapp v. Burnaby* (1), in which case a testatrix had covenanted that a sum should be paid to trustees upon certain trusts for the benefit of her children within one month after her decease, and, the sum having remained unpaid, he held that interest at 5 per cent. was payable from the time named—that is, from one month after her decease. I am not aware that that decision has ever been overruled or questioned; and, if I may say so, I think it is founded on good sense.

But it is said that the cases of *Merchant Shipping Co. v. Armitage* (3) and *London, Chatham and Dover Ry. Co. v.*

(1) 9 W. R. 765.

(2) 45 Ch. D. 225.

(3) L. R. 9 Q. B. 99.

(4) [1892] 1 Ch. 120.



*South Eastern Ry. Co.* (1) have the effect of overruling *Knapp v. Burnaby* (2); but *Knapp v. Burnaby* (2) was not cited in either of those cases, and for a very good reason—because it was not applicable. No reasons are given for the judgment of the Exchequer Chamber in *Merchant Shipping Co. v. Armitage* (3), Coleridge C.J. saying only (4): “We are of opinion that the plaintiffs are not entitled to judgment for the interest. We do not think that the principal sum is payable at a time certain.” But the reasons are not difficult to discover. The event, by reference to which the time for payment there was fixed, was not a certain event, but one which might or might not happen. Kay L.J., in *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (5), says: “In the *Merchant Shipping Co. v. Armitage* (3), by charterparty, the time for payment of the freight was two months after the date of the ship’s report inwards at the Custom House. The Court decided that the full stipulated sum was payable though part of the cargo had been lost by fire, but they refused to give interest on the ground that the principal sum was not payable at a time certain.” That is a sufficient ground for distinguishing that case from this. Death is not a contingent event—it is a certainty which must happen to all; and so many days after death is a time certain for the purposes of the statute. The statute does not require the exact day to be named, and it is rightly admitted that it makes no difference that the sum is to be paid, not on a particular day, but within a certain time. At law a covenant to pay within six calendar months after death is a covenant to pay on the last day of the six months. I therefore declare that the applicant is entitled to interest at 5 per cent. on the 2000*l.* from the expiration of the six months from the testator’s death to the time of payment.

Solicitors: *Devonshire, Monkland, Davies & Sanders; R. C. Adams Beck.*

(1) [1892] 1 Ch. 120; S.C. [1893]  
A. C. 429.

(3) L. R. 9 Q. B. 99.

(4) Ibid. 114.

(5) [1892] 1 Ch. 148.

(2) 9 W. R. 765.

CHITTY J.

1896

In re

HOBNER.

FOOKS

v.

HOBNER.

CHITTY J.

LLOYDS BANK, LIMITED *v.* BULLOCK.

1896

[1895 L. 488.]

April 21, 22.

23;

May 21.

*Mortgage by Deposit—Escrow—Legal Estate—Conflicting Equities—Priority—Trust for Sale—Breach of Trust—Trustee and Cestui que Trust—Execution of Deed—Receipt in body of Deed—Fraud—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 2 (viii.), 54 (1), 55 (1).*

In 1887 freeholds were mortgaged to a building society by H. to secure advances. In October, 1892, H. died, having devised these freeholds to N. upon trust for sale. In December, 1892, C., the solicitor who acted for the society, and also for H., and, after his death, for N., having fraudulently represented to the society that notice to pay off their mortgage had been given, procured the statutory receipt to be indorsed on the mortgage of 1887, and obtained possession of the title-deeds of the property: the money owing to the society was never paid off, N. at this time being unaware of the existence of the mortgage. N. shortly afterwards agreed to sell the property to C., who was at this time in good repute and supposed to be well off, and by a deed of December 29, 1892, which recited the trust for sale in H.'s will, N., in consideration of 700*l.* paid to him by C. at or before the execution of the deed the receipt whereof N. thereby acknowledged, conveyed the property to C. in fee. The purchase-money was not in fact paid. This conveyance and the other title-deeds, except the mortgage of 1887 and the statutory receipt, were shortly afterwards deposited by C. with the plaintiffs as security for an advance of 650*l.* In 1893 C. was adjudicated bankrupt, his frauds were discovered, and he was convicted and sentenced. The plaintiffs now claimed to enforce their security against the society, and against C. and his cestui que trust. It was admitted that the society had priority over N. and his cestui que trust, and the main contention was between the plaintiffs and the society, and the plaintiffs and N. and his cestui que trust:—

*Held*, that the society were entitled under the circumstances to shew that they had never been paid off, that the statutory receipt and the mortgage of 1887 were delivered only as an escrow, and the mortgage not having been paid off, and the legal estate being still in the society, they had priority over the plaintiffs:

• *Held* also, that the conveyance of December, 1892, was not void as between the plaintiffs and N. and his cestui que trust; that as N. had authority to deal with the property, the plaintiffs, in the absence of express notice, were entitled to rely on the receipt in the body of the deed, and had priority over the cestui que trust: *Shropshire Union Railways and Canal Co. v. Reg.* (L. R. 7 H. L. 496) distinguished:

*Held* further, that for the purposes of the present case there was no material distinction between agency and trust, and that the principles laid

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down by *Perry Herrick v. Attwood* (2 De G. & J. 21) and approved in *Brocklesby v. Temperance Permanent Building Society* ([1895] A. C. 173) applied.

CHITTY J.

1896

LLOYDS  
BANK,  
LIMITED  
v.  
BULLOCK.

## TRIAL OF ACTION.

This action was brought to determine questions as to the priority of certain incumbrances on three freehold houses at Newcastle-under-Lyme, in the county of Stafford, which had arisen between the plaintiffs and the Newcastle-under-Lyme Benefit Building Society, and also between the plaintiffs and George Newbrook, the trustee of, and the beneficiaries under, the will of one George Hood. The action was rendered necessary by the frauds of one William Edward Cartwright, a solicitor. The facts and the nature of the arguments and the result of the evidence, both oral and documentary, are sufficiently stated in the judgment.

*Farwell, Q.C., Younger, and C. F. Lloyd*, for the plaintiffs.

*Byrne, Q.C., and H. Terrell*, for the defendant building society.

*Alexander, Q.C., and Upjohn*, for the defendant Newbrook and the beneficiaries under Hood's will.

[The following authorities were cited or referred to : *Hunter v. Walters* (1); *National Provincial Bank of England v. Jackson* (2); *Rice v. Rice* (3); *Bickerton v. Walker* (4); *Shropshire Union Railways and Canal Co. v. Reg.* (5); *Perry Herrick v. Attwood* (6); *Brocklesby v. Temperance Permanent Building Society* (7); *Worthington v. German* (8); *Foster v. Mackinnon* (9); *Cory v. Eyre* (10); *Bradley v. Riches* (11); *Carritt v. Real and Personal Advance Co.* (12); *In re Richards* (13); *Edwards v. Brown* (14); *Thoroughgood's Case.* (15)]

*Cur. adv. vult.*

(1) L. R. 7 Ch. 75.

(2) 33 Ch. D. 1.

(3) 2 Drew. 73.

(4) 31 Ch. D. 151.

(5) L. R. 7 H. L. 496.

(6) 2 De G. & J. 21.

(7) [1895] A. C. 173.

(8) 16 W. R. 187.

(9) L. R. 4 C. P. 704.

(10) 1 D. J. & S. 149.

(11) 9 Ch. D. 189.

(12) 42 Ch. D. 263.

(13) 45 Ch. D. 589.

(14) 1 Cr. & J. 307.

(15) 2 Rep. 5 b, 9 a.

CHITTY J. May 21. CHITTY J. The negotiations for a compromise having failed, I proceed to give judgment.

1896  
LLOYDS  
BANK,  
LIMITED  
v.  
BULLOCK.  
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The case arises out of the frauds of William Edward Cartwright, a solicitor of Newcastle-under-Lyme, and the question is, which of the persons affected by his fraud are to suffer. The persons affected are, first, the plaintiffs, Lloyds Bank; secondly, the defendants, the building society; and, thirdly, the defendant Newbrook, trustee under the will of Hood, former owner of the property, and the persons beneficially interested under the trusts of that will. One of these beneficiaries was added as a defendant at the trial. The transaction took place in December, 1892. At that time Cartwright was in good repute and esteemed to be a man of wealth. In August, 1893, he was adjudicated bankrupt, and he was subsequently convicted of fraud, and is now undergoing sentence. At Hood's death, which occurred in October, 1892, the property was subject to a mortgage made by him to the building society by virtue of which the legal estate in fee passed to them. The property was worth about 700*l*. He devised his equity of redemption to the defendant Newbrook upon trust for sale.

Cartwright was the solicitor for the building society, and also for Hood, and, after his death, for Newbrook as trustee. Having falsely and fraudulently represented to the society that notice to pay off their mortgage had been given, Cartwright procured the necessary statutory receipt in the prescribed form to be indorsed upon the mortgage deed pursuant to the 42nd section of the Act of 1874. The receipt was dated December, 1892, the day of the month being left in blank to be filled in when the deed and receipt were exchanged for the money due. The statutory receipt was unquestionably executed merely as an escrow to be delivered over by Cartwright on redemption. Cartwright obtained possession of the deed thus indorsed, and had authority to receive the money on redemption; but he had no authority to part with the deed except upon payment of the money. The amount due was 172*l*. 11*s*. 9*d*. The society never received the money either from Cartwright or any one else. The person entitled to redeem was Newbrook, as trustee of Hood's will. He did not pay the money or any part of it.



Cartwright never received the money from any person. In fact, he never parted with the deed until after his bankruptcy, when his son handed the deed to Newbrook. Between Newbrook and the building society there is no question. Counsel for Newbrook and the beneficiaries admit, and rightly admit, that the society has priority over Newbrook and the beneficiaries under Hood's will.

CHITTY J.

1896

LLOYDS  
BANK,  
LIMITED  
v.  
BULLOCK.

The plaintiffs, however, claim priority over the building society. Their claim is merely equitable. On December 29, 1892, or a day or so later, Cartwright obtained an advance of 650*l.* from the plaintiffs, and, having possession of the title-deeds, deposited with the plaintiffs as a security for an advance of 650*l.* all the title-deeds except the deed of mortgage to the society, and signed a memorandum of deposit of the usual kind containing an undertaking to execute a mortgage. Among the deeds thus deposited was a deed of conveyance which Cartwright on December 29 obtained from Newbrook. The deeds thus deposited apparently shewed a good title in Cartwright. The mortgage to the society was not disclosed by the deeds deposited. In fact, the bank had no notice of that mortgage or the indorsed receipt; they did not advance their money on the faith of the receipt, and they were not aware of its existence until after the bankruptcy of Cartwright.

In these circumstances the plaintiffs claim priority over the building society on the ground, first, of estoppel, and, secondly, of admissions made by the society. It is plain that no case of estoppel arises. In regard to the admissions, the facts are as follows. The mortgage deed with the indorsed receipt having been removed from the society's safe by Cartwright, the society believed that he had received the money and parted with the deed on redemption; and in this belief they proved in the bankruptcy for the amount they believed Cartwright had received, and made entries in their books treating him as their debtor and the mortgage as redeemed. But subsequently, having discovered their error, they were allowed to withdraw their proof in bankruptcy. The society, having made the admissions in error, are entitled to recall them and to shew, as the facts are, that Cartwright never did receive the money, and

CHITTY J. never was their debtor. The result as between the plaintiffs and the society is this: the society have not parted with the legal estate; it still remains vested in them as security, and in respect of their security the society have priority over the plaintiffs. They are entitled to have their mortgage deed delivered over to them.

1896  
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LLOYDS  
BANK,  
LIMITED  
v.  
BULLOCK.  
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I have now to consider the questions which arise between the plaintiffs on the one hand, and the defendant Newbrook and his beneficiaries on the other. It is contended for the latter that the conveyance of December 29, 1892, is not the deed of Newbrook and that it is utterly void, the facts being sufficient to support a plea of non est factum. The deed was signed, sealed, and delivered by Newbrook at Cartwright's office on the day of its date, and the execution was attested by one of Cartwright's clerks. Newbrook was a young man of about twenty-two years of age, in the employment of the Post Office as a letter-carrier. He was able to read, but wholly unversed in business of this kind. He was desirous of putting up the property for sale by auction; but Cartwright had suggested that he might find a purchaser among his clients and save the expense of an auction. Meeting Newbrook in the street on December 29, Cartwright asked him to come into his office. When there he told Newbrook that he had not found a purchaser among his clients, and offered himself to buy the property. Newbrook then agreed to sell it to him for 700*l*. The parchment lay open on the table ready for execution. When Newbrook executed it he knew that it related to the property and to a sale of the property by him to Cartwright for 700*l*. He placed implicit confidence in Cartwright. He did not read the deed. With an exception not material to the question now under consideration, the deed is in the form of an ordinary conveyance by a trustee in execution of a trust for sale. It recites the trust for sale in Hood's will, his death, and the contract for sale by Newbrook to Cartwright for 700*l*., and witnesses that for effectuating the sale, and in consideration of 700*l*. paid by Cartwright to Newbrook at or before the execution of the deed, the receipt whereof Newbrook thereby acknowledged, Newbrook conveyed the property to Cartwright in fee simple. The

exception above referred to is that Newbrook conveys as beneficial owner. This, as I have said, is immaterial on the question whether the deed is void. The purchase-money was never in fact paid. The deed was left by Newbrook in Cartwright's hands.

On these facts I hold that the deed was not a mere nullity or void, though it may have been voidable as between Newbrook and Cartwright. This part of the case is covered by the decisions of the Court of Appeal in *Hunter v. Walters* (1) and *National Provincial Bank of England v. Jackson*. (2)

There remains the question, which have the better equity, the plaintiffs or Newbrook and his cestui que trust? The plaintiffs took their equitable security on the faith of Newbrook's conveyance. They had no notice that the purchase-money had not been paid, nor had they any ground for suspecting that Cartwright, when he deposited that conveyance, had committed or was committing any fraud on Newbrook or the beneficiaries. The plaintiffs were entitled to rely on the receipt given by Newbrook in the body of the deed. The necessity for an indorsed receipt has been abolished by the Conveyancing Act, 1881, ss. 54, 55. By the 54th section, sub-s. 1, a receipt for consideration money in the body of the deed is a sufficient discharge for the same to the person paying the same without any further receipt being indorsed on the deed. By s. 55, sub-s. 1, a receipt for consideration money in the body of the deed is, in favour of a subsequent purchaser not having notice that the money has not in fact been paid, sufficient evidence of the payment. "Purchaser" includes an equitable mortgagee (s. 2 (viii.)). These enactments bring the case within the principle on which *Rice v. Rice* (3), *Hunter v. Walters* (1), and *Bickerton v. Walker* (4) were decided.

It was argued for the persons entitled to the purchase-money under the trust for sale, that they stand in a different position from their trustee; that the plaintiffs claim through a breach of trust on his part, and that their equity, which is prior in point of time, is not displaced. In support of this argument

(1) L. R. 7 Ch. 75.

(2) 33 Ch. D. 1.

(3) 2 Drew. 73.

(4) 31 Ch. D. 151.

CHITTY J.

1896

LLOYDS  
BANK,  
LIMITED

v.  
BULLOCK.

CHITTY J. the decision of the House of Lords in *Shropshire Union Railways and Canal Co. v. Reg.* (1) was relied on. But that case is distinguishable. As between himself and the equitable owner, the trustee there had no authority whatever to deal with the trust property. Here the testator, the author of the trust, has confided to Newbrook authority to sell the property and to give a receipt for the purchase-money. Newbrook was acting within the scope of his authority. The essential part of the breach of trust was the giving of the receipt without in fact receiving the purchase-money. The circumstances appear to me to bring the case within the range of the authority of *Perry Herrick v. Attwood* (2), recently approved of and adopted by the House of Lords in *Brocklesby v. Temperance Permanent Building Society*. (3) For the purpose now under consideration, I am unable to see any material distinction between agency and trust. Further, Lord Romilly's decision in *Worthington v. German* (4) substantially covers the present case, and is in favour of the plaintiffs. Mr. Upjohn, in his argument for the beneficiaries, mentioned an unreported case before me. But I have referred to my notes, and cannot find that the point now under consideration was raised. A judgment for the beneficiaries in the circumstances of this case would be disastrous to titles: it would compel purchasers, where the legal estate is outstanding in a mortgagee, to inquire whether purchase-money under a trust for sale had in fact been paid, notwithstanding that the trustee had acknowledged the receipt, and it would cast this burden on them in the teeth of the 55th section of the Conveyancing Act, which relieves them from making any such inquiry.

For these reasons, I hold that the plaintiffs have priority over the defendant Newbrook and his cestui que trustent.

Solicitors: *Thorowgood, Tabor, & Hardcastle, for Cooper & Co., Newcastle, Staffordshire; Pitman & Sons, for F. W. Bayley, Newcastle, Staffordshire; J. W. Sykes, for Thomas B. Sproston, Newcastle, Staffordshire.*

(1) L. R. 7 H. L. 496.

(2) 2 De G. & J. 21.

(3) [1895] A. C. 173.

(4) 16 W. R. 187.



*In re* PITCAIRN.  
BRANDRETH *v.* COLVIN.

[1895 P. 862.]

NORTH J.

1895

Oct. 31;  
Nov. 1, 2, 5.

*Tenant for Life and Remainderman—Reversionary Property—Conversion—Apportionment between Capital and Income—Discretionary Power of Sale in Trustees—Rule in Howe v. Earl of Dartmouth (7 Ves. 137 a)—Will—Construction.*

A testator devised and bequeathed his property to trustees, upon trust for his mother for her life, with remainder to other persons. And he gave to his trustees, if and when they should consider it expedient, full power to sell and dispose of all or any part of his estate. Part of the testator's property consisted of the reversion, expectant on the death of his mother, of funds settled on her marriage of which she was tenant for life. The trustees did not convert this reversionary interest during the mother's life:—

*Held*, that the discretionary power of sale given by the will to the trustees excluded the application of the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137 a), and that the personal representative of the mother was not, after her death, entitled to any part of the proceeds of the sale of the reversion.

SUMMONS by one of the executors of the will of Margaret Matilda Pitcairn, widow, deceased, as plaintiff, against the trustees and executors under the trust disposition and settlement (or will) in Scottish form, dated November 3, 1876, made by Cecil Colvin Pitcairn (domiciled in England), who was the son of Margaret Matilda Pitcairn, as defendants. One of the defendants was also an executor of the will of Margaret Matilda Pitcairn. She was a devisee and cestui que trust under the trust disposition and settlement of November 3, 1876, and the summons raised the questions—(1.) whether she was entitled on the death of C. C. Pitcairn to have so much of his estate as consisted of certain reversionary interests sold and the income thereof paid to her during her life; and (2.) whether her executors were entitled to a payment out of the estate of C. C. Pitcairn in respect of the income which she would have received had the reversionary interests been sold; and, if so, how the amount of that payment was to be ascertained.

NORTH J.

1895

*In re*

PITCAIRN.

BRANDRETH

v.

COLVIN.

The reversionary interests in question arose under the settlement executed on the marriage of Margaret Matilda Pitcairn and her deceased husband, and under two wills, and they were vested in C. C. Pitcairn, subject only to an estate for life given to his mother.

By the trust disposition of November 3, 1876, C. C. Pitcairn gave, devised, and bequeathed unto three trustees therein named "all and sundry my whole means and estate, heritable and movable, real and personal, wherever situated or addebted, presently belonging or which shall belong or be addebted to me at the time of my death . . . . And I nominate and appoint my trustees to be my sole executors, but declaring always that these presents are granted by me in trust only and for the uses and purposes after mentioned, viz. (1.) that my trustees shall from the produce of my means and estate pay all my just and lawful debts and funeral expenses and the expenses of executing the trust; (2.) that my trustees shall pay over to my mother in the event of her surviving me during her life after my decease the whole interests, dividends and other annual produce and profits of the trust estate under their management for her alimentary use . . . . or otherwise my trustees shall permit and suffer or legally authorize and empower my said mother to uplift and receive the said interests, dividends and other annual produce and profits of the said trust estate during her life after my decease in the event of her surviving me; (3.) that my trustees shall as soon as convenient after my death in the event of my said mother predeceasing me or after her death in the event of her surviving me" pay certain specified pecuniary legacies amounting in the whole to 21,000*l.*; "(4.) that my trustees shall as soon as convenient after my death or after the death of my said mother in case she shall survive me set aside three sums of 2000*l.* each" for the purpose of paying the income thereof respectively to three specified persons respectively, "and on the death of any of them the capital of the sum life-rented by him or her shall be paid over by my trustees to the persons who shall happen to be at the time my nearest relations by blood on the father's side, equally among them share and share alike; (5.) that my trustees shall as soon as convenient after

my death or after the death of my said mother" pay six legacies of 500*l.* each to charities and a legacy of 100*l.* to each of the three trustees. And the testator directed that "the legacies bequeathed by this fifth purpose shall be paid by my trustees preferably to the other legacies bequeathed by me, . . . (6.) that my trustees shall as soon as convenient after my death, or after the death of my mother in case she shall survive me, set aside a sum sufficient to provide an annuity of 50*l.* per annum" and to pay the same to an old servant of his mother, the capital sum on the death of the annuitant to form part of the residue of the trust estate; "(7.) that my trustees shall also pay . . . all such other legacies . . . and implement all such instructions as shall be contained in any codicil, memorandum, or writing left by me expressive of my will though not formally executed . . . declaring that in case it shall happen that after payment of my debts and the expenses of the trust hereby created, and the legacies contained in the fifth purpose hereof, which are declared to be preferable, the proceeds of my estate shall on realization prove insufficient to provide for the full payment of the other legacies and bequests hereinbefore made or to be made by me, such other legacies and bequests shall in that event suffer a rateable reduction according to their respective amounts and shall be payable to the various beneficiaries under such deductions. And with regard to the residue and remainder (if any) of my said means and estate, after implementing the foregoing purposes of these presents, my trustees shall pay, assign and convey the same" to two persons named as trustees for charitable purposes. And for executing the trust thereby created the testator thereby conferred on his trustees (*inter alia*) "if and when they shall consider it expedient full power to sell and dispose of all or any part of my said estate and effects hereby conveyed." And he gave power to his trustees to lay out and invest the trust funds on the securities therein mentioned.

The testator died on February 3, 1880; his mother died in 1894. The trustees did not during her life sell the reversionary interests, of which, therefore, they came into possession on her death. The value of the property of which the mother was

NORTH J.

1895

*In re*

PITCAIRN.

BRANDRETH

*v.*

COLVIN.

NORTH J. tenant for life, independently of the son's will, was about 1895 30,000*l.*; the value of the son's property other than the reversionary interests was about 13,000*l.* or 14,000*l.*

*In re*  
PITCAIRN.

BRANDRETH  
v.  
COLVIN.  

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*Everitt, Q.C.*, and *Howard Wright*, for the plaintiff. The rule in *Howe v. Earl of Dartmouth* (1) applies, and the reversion ought to have been converted immediately after the death of the testator, the proceeds invested, and the income thereof paid to the mother during her life. Her representatives are entitled, now that the reversion has fallen into possession, to be placed in the same position, by means of a payment out of the reversionary property, as if the conversion had taken place at the proper time: *In re Earl of Chesterfield's Trusts*. (2) *Primâ facie* the rule in *Howe v. Earl of Dartmouth* (1) applies to such a case, and the burden of proof is on those who assert that it does not: *Morgan v. Morgan* (3); *Johnson v. Routh* (4); *Pickup v. Atkinson* (5); *Countess of Harrington v. Sir W. Atherton*. (6) The fact that the reversion is subject to the life estate of the person who is made tenant for life by the will is not a reason for excluding the general rule, and there is nothing else in this will to exclude its operation.

In making the apportionment between capital and income interest should be calculated at the rate of 3 per cent., not 4 per cent.: *In re Goodenough*. (7)

*Haldane, Q.C.*, and *R. Campbell*, for the defendants. The rule in *Howe v. Earl of Dartmouth* (1) is a rule, not of construction, but of administration. It is a very flexible rule, and will yield to a very slight expression of a contrary intention by the testator. The Court must look at the whole will and must have regard to the nature of the property: *Alcock v. Sloper* (8); *Collins v. Collins* (9); *Pickering v. Pickering* (10); *Hinves v. Hinves* (11); *Daniel v. Warren* (12); *Burton v. Mount* (13);

(1) 7 Ves. 137 a.

(2) 24 Ch. D. 643.

(3) 14 Beav. 72.

(4) 27 L. J. (Ch.) 305.

(5) 4 Hare, 624.

(6) 2 D. J. & S. 352.

(7) [1895] 2 Ch. 537.

(8) 2 My. & K. 699.

(9) *Ibid.* 703.

(10) 4 My. & Cr. 289.

(11) 3 Hare, 609.

(12) 2 Y. & C. Ch. 290.

(13) 2 De G. & Sm. 383.



*Skirving v. Williams* (1); *In re Sewell's Estate.* (2) The provisions of this will as a whole, and in particular the discretionary power of sale given to the trustees, are inconsistent with the notion that the testator intended the reversion to be converted immediately after his death.. And it is extremely improbable that he could have intended that his mother should have a second life estate in the reversion of property of which she was already tenant for life. There is no reported case of this kind in which it has been held that the rule in *Howe v. Earl of Dartmouth* (3) applied.

*Everitt, Q.C.*, in reply. Suppose the testator's property in possession had not been more than sufficient to pay his debts and funeral and testamentary expenses, could he have intended that in that case his mother should take no benefit under his will? The true inference is that he intended the reversionary property to be converted in accordance with the ordinary rule. [He referred to *Wilkinson v. Duncan* (4); *In re Llewellyn's Trust.* (5) ]

NORTH J. The point in this case, though a short one, is interesting and not free from difficulty. [His Lordship stated the facts, and continued :—]

The rule of the Court is, I think, very clearly settled, and it will be sufficient for me to refer, in the first instance at any rate, to the well known case, *Howe v. Earl of Dartmouth* (3), in which Lord Eldon, speaking of the will then before him, said (6) : “ It is given as all his personal estate ; and the mode, in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then the Court says, it is to be construed, as to the perishable part, so that one shall take for life, and the others afterwards ; and unless the testator directs the mode, so that it is to continue as it was, the Court understands, that it shall be put in such a state, that the others may enjoy it after the decease of the first ; and the thing is quite equal ; for it might consist of a vast number of particulars : for

NORTH J.

1895

*In re*

PITCAIRN.

BRANDRETH

*v.*

COLVIN.

(1) 24 Beav. 275.

(2) L. R. 11 Eq. 80.

(3) 7 Ves. 137 a.

(4) 23 Beav. 469.

(5) 29 Beav. 171.

(6) 7 Ves. 148.

NORTH J. instance, a personal annuity, not to commence in enjoyment till  
 1895 the expiration of twenty years from the death of the testator,  
In re payable upon a contingency perhaps." He might have taken  
 PITCAIRN. the case of a policy on a life in being or a reversion pure and  
 BRANDRETH simple, as in the present case. Lord Eldon continued: "If in  
 v. this case it is equitable, that Long or Short Annuities should be  
 COLVIN. sold, to give every one an equal chance, the Court acts equally  
 in the other case; for those future interests are for the sake of  
 the tenant for life to be converted into a present interest;  
 being sold immediately, in order to yield an immediate interest  
 to the tenant for life. As in the one case that, in which the  
 tenant for life has too great an interest, is melted for the benefit  
 of the rest, in the other that, of which, if it remained in specie,  
 he might never receive anything, is brought in; and he has  
 immediately the interest of its present worth."

There he deals shortly with the case of a wasting security, where the tenant for life, if enjoying it in specie, would receive more than his fair share, and of a reversionary interest where the tenant for life would have less than his fair share, if he received no income from it while the reversion still remained a reversion.

Then in *Morgan v. Morgan* (1) Sir J. Romilly M.R. said (2): "Now the rule of law as applicable to these cases is not, I think, open to doubt, although the application of the rule to particular cases may be, and frequently is, a matter of very considerable difficulty." Then he referred to the rule as laid down in *Howe v. Earl of Dartmouth* (3), and continued: "This rule has been since affirmed, as often as it has been referred to, and is unquestionably the law. But the testator may take the case of any particular bequest out of this rule; and the effect of the latter cases has been, to allow small indications of intention to prevent the application of the rule. The question here, as in similar cases, is one of construction, whether the testator has, in this will, expressed his intention, that this rule shall not apply to this particular case. It is urged by the petitioners, that the burden of proof does not lie upon them more than on

(1) 14 Beav. 72.

(2) 14 Beav. 81.

(3) 7 Ves. 137 a.

the respondents, and that being a question of construction, it is for the Court to look into the will and discover the testator's real meaning. In one sense, this is certainly true; but still, in my opinion, the rule of law is, that, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe v. Earl of Dartmouth* (1) is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the Court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done, the rule must apply. The reported decisions on the subject are useful, as they form a guide to enable the Court to ascertain what directions contained in a will are properly considered to be an expression by the testator of his intention that this rule is not to apply. In no case that I have been able to find has the mere absence of any direction to convert his property been construed to mean that it should be enjoyed in specie by the legatees in succession; and the contrary must have been decided, though not expressly so stated, in *Johnson v. Johnson*. (2) There are several cases in which the Court held that the rule was excluded, where the testator has fixed the period of conversion; as, for instance, where he has given the property to one for life, and, after the death of that person, has directed the property to be sold and divided." Then, after referring to one or two cases upon which I need not dwell, the Master of the Rolls said: "I think, therefore, that the absence of this direction" (that is, a direction to convert) "cannot be treated as an expression of intention on the part of the testator, that his property was not ever to be converted; it would, I think, be unreasonable if it were so held. By law, the property must be converted; a testator may not unreasonably be supposed to be cognisant of that law, and to have given no direction on the subject, because he may have supposed that it would be mere surplusage so to do."

There are two other cases laying down the general rule. One of them is *Hinves v. Hinves* (3), where Wigram V.-C., after referring to the rule of the Court in the absence of any

NORTH J.

1895

*In re*

PITCAIRN.

BRANDRETH

v.

COLVIN.

(1) 7 Ves. 137 a.

(2) 2 Coll. 441.

(3) 3 Hare, 609.

NORTH J. expression of intention, used these words (1), which seem to be  
 1895 very much in point here: "But, if the will expresses an intention  
 ~~~~~ that the property as it existed at the death of the testator shall  
In re be enjoyed in specie, although the property be not, in a technical
 PITCAIRN. sense, specifically bequeathed, to such a case the rule does not
 BRANDRETH apply. The rule is settled with sufficient clearness; the
v. difficulty arises only in its application to particular cases, where
 COLVIN. the intention of the testator is expressed with more or less
 _____ distinctness."

The other case is *Pickup v. Atkinson* (2), where the same learned judge said (3): "Cases calling for a decision on this question have arisen in each branch of the court within the last few years, and in each branch of the court the rule appears to have been stated in the same way. If the will manifests an intention that the general residue of the estate shall be enjoyed by different persons in succession, and there is nothing to qualify that simple intention, the Court, in order to effectuate it, converts so much of the testator's estate as is of a perishable nature (under which head leasehold property falls) into investments of a permanent kind." And, of course, although he does not state the alternative, it converts reversionary property on similar principles. "But if the intention of the testator appears to be, that the first taker shall enjoy the property in that state in which it exists at his death, the Court is bound to give effect to that intention."

I take it, therefore, to be clear, from these and numerous other cases, that the question is, what was the testator's intention, and that intention must be gathered from his will. He has the right to say what is to be done, and his intention, as expressed in or to be deduced from the terms of his will, must be carried out. But, if he has given no direction on the subject, the Court applies its own rule. [His Lordship then referred to the will, and read the devise and bequest to trustees, and the first trust for the payment of debts and funeral expenses and the expenses of executing the trust.] The expression "my means and estate" of course denotes everything of which the testator died possessed—everything that

(1) 3 Hare, 611.

(2) 4 Hare, 624.

(3) 4 Hare, 628.

came to the trustees under the will. It was said that this payment was to be made at once. Of course the debts and funeral expenses must be paid at once, and also certain of the expenses of executing the trusts, although, of course, the expenses of executing the trusts could not all be disposed of in the first instance: they would continue until the estate was wound up and distributed among the persons ultimately entitled to it.

Now, as Mr. Haldane remarked, there is a reference to an actual receipt by the tenant for life of the income produced by the estate as it stood; apparently, the trustees may not only pay the income over to her, but they may allow her to receive herself the income produced, letting her do what they might do—and she of course as tenant for life would not have any power to convert the estate. So far as that clause goes, I think it is of very little weight. If anything, it is rather inconsistent with an intention that any property not producing income was to be converted in order that the proceeds might produce income. [His Lordship read the 3rd, 4th, 5th, 6th, and 7th trusts, and continued:—]

The testator was there contemplating, not only the legacies which he had expressly mentioned, amounting to about 30,000*l.*, but that further legacies given by an instrument equivalent to a will would have to be paid out of the estate. He was not, therefore, dealing with the 30,000*l.* as a sum corresponding, as is suggested, with the value of the reversions which would fall in upon his mother's death, but he was contemplating that that sum might be increased by other legacies subsequently added to it. [His Lordship then read the clause which provided that in case, after payment of the testator's debts and the expenses of the trust thereby created and the legacies which were to be paid in preference, the proceeds of his estate should "on realization prove insufficient to provide for the full payment of the other legacies hereinbefore made or to be made by me," those other legacies should in that event suffer a rateable reduction.] At this point the testator is contemplating a "realization" of his estate, and that is a realization of the estate as it existed immediately before the death of his mother

NORTH J.

1895

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In re

PITCAIRN.

BRANDRETH

v.

COLVIN.

NORTH J. in the event (which has happened) of her surviving him.
1895 "Realization" there must mean conversion into money of the
~~~~~ investments of which the estate consisted for the purpose of  
*In re* paying the various legacies and paying over the residue. The  
PITCAIRN, word "realization" there refers, in my opinion, to the whole  
BRANDRETH of the estate as it then existed, and it does not throw any light  
*v.* on the question with which I have to deal, whether the  
COLVIN, reversions ought to have been converted, or whether there is  
any direction in the will that they are to be enjoyed in specie.

Then we come to the gift of the residue, where the testator directs that his trustees shall "pay, assign and convey" to certain persons on charitable trusts.

The direction is, not to pay over moneys arising from the "realization," but it is to "pay, assign and convey" the property as it exists. No doubt, as Mr. Everitt said, that may apply to real estate which the testator might acquire subsequently to the date of his will, and the opening words of the will refer to real estate which he then had or might have at the time of his death. But the phrase "assign and convey" seems to me to point to a conversion not taking place, for it could not well apply to the handing over of proceeds of sale.

Then the testator confers some powers on his trustees for executing the trusts thereby created. He gives them power "to enter into the possession and management of my said estate and effects." He is dealing with a power to be exercised by the trustees during the continuance of the trust, and he uses the phrase "my said estate and effects," which is similar to the phrase which he used in the beginning of the will with reference to the fund out of which his debts and funeral expenses were to be paid. There he called it "my means and estate"; here he speaks of "my estate and effects." Then he gives power to his trustees "to enter into the possession and management of my said estate and effects and to call, sue for, uplift, receive and discharge the rents . . . interests, dividends and annual profits arising from the same," and to employ factors, agents, or cashiers "for managing my said means and estate." This refers to what is to take place during the continuance of the trust. The trustees are to manage what is

clearly the unconverted estate which is described at the beginning of the will. Then he gives the trustees, "if and when they shall consider it expedient, full power to sell and dispose of all or any part of my said estate and effects hereby conveyed. . . . and at such price or prices as they may think proper," and then follows a direction as to the securities on which the trust funds may be invested. This seems to me to give the clue to the meaning of the will. In my opinion, this power given to the trustees to sell and dispose of the estate "if and when they shall consider it expedient" means that they are to have the power of selling or disposing of it if they think it expedient and when they think it expedient; and if they have power to do this they necessarily have power not to do it. If they have the power to sell if and when they think fit, then they necessarily have power not to sell unless they think fit; and that, in my opinion, amounts to an express power to the trustees to convert the estate or not as they think fit.

It seems to me that several authorities shew that, when a testator has directed that the conversion of his estate shall take place at some time other than that at which the rule of the Court would make conversion necessary, the rule of the Court has no application. I have read a passage from *Morgan v. Morgan* (1) in which this was pointed out by the Master of the Rolls.

In the present case the testator has not himself fixed the period of conversion, but he has given the option of saying when the conversion is to take place to another person; and this seems to me to be equally effective in negating the rule of the Court which would require the conversion to take place immediately, or as soon as possible, after the death of the testator. No doubt in *Morgan v. Morgan* (1), in the illustration given, the time fixed is the death of a particular person; but there are two or three cases where the same rule has been applied where a particular time is not fixed. In *Alcock v. Slopers* (2) the testator gave the residue of his estate to his executors, upon trust to permit his wife "to receive the rents, profits, dividends, and annual proceeds thereof" during her life, and

NORTH J.

1895

*In re*

PITCAIRN.

BRANDRETH

v.

COLVIN.

(1) 14 Beav. 72.

(2) 2 My. &amp; K. 699.

NORTH J.  
 1895  
*In re*  
 PITCAIRN.  
 BRANDRETH  
*v.*  
 COLVIN.

after her death, "upon trust to sell my freehold house in Oxford Street, and also my leasehold houses, by auction; and it is my desire that Mr. Edward Abbott be employed as auctioneer, to convert the whole of my estate and effects into money, and to distribute the same in equal shares and proportions." Part of the testator's residuary estate consisted of a sum of Long Annuities. Sir John Leach M.R., in his judgment, after referring to *Howe v. Earl of Dartmouth* (1), said (2): "It is with a view to this principle that the present will is to be examined. The testator gives the residuary estate to trustees 'upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof, to and for her own sole use and benefit, during her life.' There is here no intimation of an intention that any part of the property should be immediately converted by the trustees; but the inference rather is, that the trustees during the life of the wife were to be merely passive; and the term 'dividends' has reference to the Long Annuities. After the death of his wife, he directs his trustees to sell his freehold house in Oxford Street, and also his leasehold houses, by auction. The leasehold houses, like the Long Annuities, were a wasting property; and he has plainly expressed his intention that they should not be sold during the life of his wife; and this is manifestly inconsistent with the general notion on his part that the wasting portion of his residuary estate was immediately to be converted into permanent property. . . . The testator could not have meant that Mr. Abbott should convert the whole of his property after the death of his wife, if he had intended that any part of it should be converted during the life of his wife. The widow is therefore entitled to enjoy for her life"—what? Not the income of the leasehold and freehold houses, but "the income of the Long Annuities," the other wasting property. Then in *Burton v. Mount* (3) there was a general gift of the testator's real and personal estate, on trust to pay the income to his son for life, and after his death for his son's children: "And the testator empowered his trustees, notwithstanding the devise and bequest of his freehold and leasehold estates respec-

(1) 7 Ves. 137 a.

(2) 2 My. &amp; K. 702.

(3) 2 De G. &amp; Sm. 383.



tively, at any time or times, or from time to time, at their discretion, to make sale and dispose of the freehold and leasehold estates, or any of them, or any part or parts thereof," with the exception of his dwelling-house during his wife's estate and interest therein. There Knight Bruce V.-C. came to the conclusion that the discretion given to the trustees as to the time at which they were to sell was inconsistent with its being the intention of the testator that the property should be sold under the rule of the Court immediately after his death, and he decided the point, as regarded both the leaseholds and the Long Annuities, in favour of the tenant for life. Again, *In re Sewell's Estate* (1) seems to me to be exactly in point. It shews that when the time of sale is fixed by the will, either by reference to a given number of years after the testator's death, or by the falling in of a life, or anything of that kind, or when it is left to the discretion of some one else to say when the sale is to take place, the testator himself having by his will provided for the sale, there is no rule of the Court which requires that the sale should be made in a different way or under different circumstances from those indicated by the will.

I find in the present case that the trustees are to have full power, "if and when they shall consider it expedient," to sell and dispose of all or any part of the estate and effects; and it seems to me that in the exercise of that power they have a discretion to regulate the time of sale, which is inconsistent with, and negatives, any intention of the testator that the Court should realize the reversionary property, as it would do if there had been no such discretion.

The trustees did in fact allow the reversion to remain unsold; and therefore, in my opinion, the representatives of the tenant for life are not now entitled to any part of the proceeds of sale.

Solicitors: *Freshfields & Williams; Nicholl, Manisty & Co.* (2)

(1) L. R. 11 Eq. 80.  
(2) The publication of this case has been delayed because an appeal was presented against the decision. Ultimately, however, the parties entered into a compromise, and the appeal was not prosecuted.—W. L. C.

W. L. C.

NORTH J.  
1895  
*In re*  
PITCAIRN.  
BRANDRETH  
v.  
COLVIN.

NORTH J.      RICHARDS *v.* OVERSEERS OF KIDDERMINSTER.

1896

April 21, 22.

[1895 R. 1792.]

RICHARDS *v.* MAYOR OF KIDDERMINSTER.

[1895 R. 1814.]

*Company—Debenture—Covering Deed—Receiver—Poor-rate—District Rate—Change of Occupancy—Winding-up—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 14—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 16—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 3—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24, sub-s. 2—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (a).*

A deed of charge on the assets of a company registered under the Companies Act, 1862, to cover debentures is not a bill of sale within s. 14 of the Bills of Sale Act, 1878, Amendment Act, 1882.

The general district rate of an urban sanitary authority is not a tax or poor or other parochial rate within the meaning of s. 14 of the Bills of Sale Act, 1878, Amendment Act, 1882.

A deed of floating charge on the assets of a company gave power to the trustee to appoint a receiver and manager, who was expressed to be the agent of the mortgagor:—

*Held*, that, on a receiver duly appointed under the power entering into possession of the premises and commencing to carry on the business of the company, there was a change of occupancy within the meaning of the Poor Rate Assessment and Collection Act, 1869, s. 16, and the Public Health Act, 1875, s. 211, sub-s. 3.

There is no preferential charge in respect of rates on effects of a company in the hands of a receiver for debenture-holders when the company is being wound up.

THE plaintiff in these actions was the trustee of a deed dated February 13, 1891, to secure first debentures of even date to the amount of 20,000*l.*, issued by Henry Jecks Dixon & Sons, Limited. The plaintiff was also holder of a debenture of that issue.

The covering deed was executed between the company of the one part and the plaintiff as trustee for debenture-holders of the other part. The company thereby assigned to the plaintiff as trustee all their assets except uncalled capital on trust to permit

the company to hold the assets and carry on business therewith until the security thereby constituted became enforceable as thereafter provided. It was provided that "at any time after . . . . a resolution to wind up the company shall have been passed or a notice shall have been given of a meeting to consider a proposed extraordinary resolution for winding up the company . . . . The said trustee at his own instance or at the request in writing of the holders of one-fourth in value of the debentures of this issue outstanding without further notice may appoint one or more persons (being a debenture-holder or holders or not) to be a receiver or receivers of all or any part of the mortgaged premises in like manner in every respect as if the said trustee were a mortgagee within the meaning of the Conveyancing and Law of Property Act, 1881, and had become entitled under that Act to exercise the power of sale conferred: and every receiver so appointed shall have and be entitled to exercise all powers conferred by the said Act as if such receiver or receivers had been duly appointed thereunder: and in particular, by way of addition to but without hereby limiting any general powers hereinbefore referred to, every such receiver so appointed by the said trustees shall have power to do the following things, namely, (a) take immediate possession of the property hereby charged or any part thereof"; (b) carry on business and do other things specifically mentioned. It was also provided by art. 6: "The trustee shall not nor shall any receiver or receivers appointed by him as aforesaid by reason of the receiver or receivers entering into possession of the property hereby charged or any part thereof be liable to account as mortgagee in possession or be liable for any loss on realization or for any default or omission for which a mortgagee in possession might be liable; but every receiver duly appointed by the trustee under the power in that behalf hereinbefore contained shall be deemed to be the agent of the company, and shall as such agent for all purposes be deemed to be in exactly the same position as a receiver duly appointed by the mortgagee under the Conveyancing and Law of Property Act, 1881: and every such receiver and the trustee shall be entitled to all the rights powers privileges and immunities by the said Act conferred on

NORTH J.

1896

RICHARDS

v.

OVERSEERS  
OF KIDDER-  
MINSTER.

RICHARDS

v.

MAYOR OF  
KIDDER-  
MINSTER.

NORTH J. mortgagees and receivers when such receivers have been appointed under that Act.”

1896  
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 RICHARDS
 v.
 OVERSEERS
 OF KIDDER-
 MINSTER.
 ———
 RICHARDS
 v.
 MAYOR OF
 KIDDER-
 MINSTER.
 ———

On September 5, 1895, a notice was given to the shareholders of Henry Jecks Dixon & Sons, Limited, of a meeting to consider a proposed extraordinary resolution for winding up the company, which resolution was afterwards duly passed and confirmed. On the same September 5, 1895, the plaintiff appointed Alfred Page receiver of the premises comprised in the covering deed of February 13, 1891. Alfred Page thereupon entered into possession of the company's works at Kidderminster, and from that time forth carried on the business there as receiver. The overseers of Kidderminster had made a poor-rate for the period from April 19 to September 30, 1895.

The rate payable in respect of the company's Long Meadow Mills was 73*l.* 11*s.* 2*d.* The collector apportioned the part payable for the period down to September 5 as 62*l.* 5*s.* 8*d.*, and the portion payable for the period from September 5 to September 30 as 11*l.* 5*s.* 6*d.* The receiver paid the 11*l.* 5*s.* 6*d.* The overseers put in a distraint for the 62*l.* 5*s.* 8*d.* The first of the actions was brought to restrain the overseers of Kidderminster from proceeding with the distress. The action was brought on on motion for an interlocutory injunction by arrangement. The receiver paid the 62*l.* 5*s.* 8*d.* into a bank, and the action was set down in the non-witness list for the purpose of trying the question whether the overseers were entitled to distrain on the goods in the possession of the receiver for the 62*l.* 5*s.* 8*d.*

The second action related to a distress put in by the corporation of Kidderminster on Long Meadow Mills for 66*l.* 5*s.* 6*d.*, the apportioned part of a general district rate in respect of the period from May 1 to September 5, 1895, part of a rate of 79*l.* 4*s.* 4*d.* Except that the one action related to a poor-rate, the other to a general district rate, the circumstances were the same.

Both actions now came on to try the question whether the respective distresses could be enforced.

RICHARDS *v.* OVERSEERS OF KIDDERMINSTER.

E. Clayton, for the plaintiff. There was within the meaning

of s. 16 of the Poor Rate Assessment and Collection Act, 1869, a change of occupation when the receiver took possession of the premises. The receiver is, therefore, liable only for the apportioned part of the rate in respect of the time subsequent to that date, namely, the 11*l.* 5*s.* 6*d.* he has paid; the defendants' collector has himself treated the matter on that footing.

[NORTH J. In my opinion the overseers are not estopped by reason of that.]

Rowden, for the defendant overseers. In the first place, the rate is made a preferential payment under the Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1 (*a*), which gives the overseers a preferential right over the goods which at the time of the appointment of the receiver were in the power of the company.

In the second place, the premises and the goods on them were in the occupation and under the control of the receiver, as agent of the mortgagor company, by the express provision of the covering deed which incorporates s. 24, sub-s. 2, of the Conveyancing Act, 1881, and makes the receiver the agent of the mortgagors; and therefore the occupation of the receiver was the occupation of the company; it follows that no change of occupation took place when the receiver went in, within the meaning of s. 16 of the Poor Rate Assessment and Collection Act, 1869; and the unpaid rate can be distrained for.

In the third place, such title as the debenture-holders have is derived through the covering deed: the receiver was appointed under that deed. That deed is void under s. 14 of the Bills of Sale Act, 1882, because it is a bill of sale and is not a debenture within the saving clause s. 17 of the Act: *Brocklehurst v. Railway Printing and Publishing Co.* (1); *Ross v. Army and Navy Hotel Co.* (2) Therefore the goods on the premises remained the property of the company, and were subject to distress for the whole rate.

[NORTH J. Does not the case of *In re Standard Manufacturing Co.* (3) shew that the covering deed is not a bill of sale that requires registration?]

(1) W. N. (1884) 70.

(2) 34 Ch. D. 43.

(3) [1891] 1 Ch. 627.

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

Not necessarily so. In the case of *Great Northern Ry. Co. v. Coal Co-operative Society* (1) Vaughan Williams J. held that an instrument of a similar character executed by a friendly society required registration under the Bills of Sale Act.

E. Clayton, in reply. The covering deed is a debenture within the exception contained in s. 17 of the Bills of Sale Act Amendment Act, 1882. It fulfils the requirements of a debenture laid down by Chitty J. in *Edmonds v. Blaina Furnaces Co.* (2); *Levy v. Abercorris Slate and Slab Co.* (3) There was no decision on this point in the case of *Ross v. Army and Navy Hotel Co.* (4)

If the covering deed be not a debenture but a bill of sale, inasmuch as it requires registration under s. 43 of the Companies Act, 1862, it is not within the mischief aimed at by s. 14 of the Bills of Sale Act, 1882, and is not void for want of registration as a bill of sale: *In re Standard Manufacturing Co.* (5) Even if the covering deed were void, it would be void only so far as the chattels are concerned, and a good title is given to them under the debentures.

The powers of the receiver to enter and carry on the business, and the whole scope of the provisions in the covering deed relating to a receiver, are inconsistent with the receiver being in the position of mere agent for the company.

The reference to the Conveyancing Act, 1881, and the provision limiting the liability of the mortgagee in case of the appointment of a receiver, only affect the mutual relationship between mortgagor and mortgagee, and do not affect the rights of persons not parties to the contract.

RICHARDS v. MAYOR OF KIDDERMINSTER.

E. Clayton, for the plaintiff. If the overseers can establish a right in respect of the poor-rate to the benefit of s. 14 of the Bills of Sale Act, 1882, the defendant corporation are not in the same position in respect of the general district rate, which is neither a tax or poor or other parochial rate. In all other respects the principles governing the two cases are alike.

(1) [1896] 1 Ch. 187.

(2) 36 Ch. D. 215.

(3) 37 Ch. D. 260.

(4) 34 Ch. D. 43.

(5) [1891] 1 Ch. 627.

Rowden, for the defendants. The general district rate is a tax: it is within the intention of the enactment; it is subject to all the incidents of a poor-rate.

NORTH J. I am of opinion that a general district rate is not a tax, and it cannot be brought within the enactment unless it is a parochial rate. It is imposed in respect of a district which may or may not include one or more parishes, or might have included before the last Local Government Act only part of a parish. In my opinion it is not a parochial rate. I will give judgment in both actions to-morrow morning.

April 22. NORTH J. (after stating the facts). I will consider first the action against the overseers. Several grounds of defence are raised. The first ground is that by virtue of the statute 51 & 52 Vict. c. 62, s. 1, the overseers of the poor are preferred creditors. I do not think that Act has any application. The Act is intituled "An Act to amend the law with respect to preferential payments in bankruptcy, and in the winding up of companies." It provides that in the distribution of the assets of any company being wound up under the Act there shall be paid in priority to all other debts all parochial or other local rates due from the company at the date of the commencement of the winding-up. That enactment seems to deal simply with preferential payments to be made by the person who holds the funds to be distributed—the official trustee, or whoever it may be—out of the assets in his hands; and it is a direction as to the mode in which payments are to be made—to the effect that out of the sums distributable by him what are treated in this section as the preferential debts are to be paid first. The preferred creditors are to be paid out of the assets before any other creditors; but, in my opinion, that does not in any way affect persons who are not claiming as creditors in the winding-up at all, but who hold security upon property which the company has in some way charged in their favour.

It was said that s. 1, sub-s. 4, goes further. It provides: "In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

company being wound up within three months next before the date of the receiving order or the winding-up order respectively, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof," followed by a proviso, "that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made." No doubt that section does go rather further than to direct what is to be done with the assets in the hands of the trustee in bankruptcy; but it deals only with a particular case which has not happened, and does not, in my opinion, affect the present case in any way.

The next point relates to the effect of a change of occupation of the property. The poor-rate was imposed under the old Act for the Relief of the Poor, passed in the 43rd year of Elizabeth, providing for the appointment of overseers of the poor and their raising poor-rates from the occupiers of property. Then, in the latter part of what is called the 2nd section of the Act in the Revised Edition of the Statutes, it is provided that it shall be lawful for the overseers by warrant from two justices to levy the sums of every one who shall refuse to contribute according as they shall be assessed by distress and sale of the offender's goods.

The most material enactment is contained in 32 & 33 Vict. c. 41, s. 16, which provides that "if the occupier assessed in the rate when made"—that is, the poor-rate—"shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate-book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in

like manner, and with the like remedy of appeal, as if he had been rated when the rate was made ; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made."

In the present case it is said there has not been any change of occupation, though in point of fact it is clear there was ; but the legal effect of what was done has to be considered. Now, as to that, the ground upon which it is put is that the receiver appointed on September 5 was in the same position as a receiver appointed under the Conveyancing Act of 1881. Sect. 19 of that Act provides : " A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further." One power (sub-s. 1, cl. iii.) is : " A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof." Sect. 24, sub-s. 2, provides : " The receiver shall be deemed to be the agent of the mortgagor ; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides."

[After reading the provisions of the covering deed set out above, his Lordship continued :—]

Therefore, the power of appointing a receiver contained in the covering deed goes much further than anything contained in the 24th section of the Conveyancing Act ; but the 19th section, which, among other powers, gave the mortgagee power to appoint a receiver of income, provided also, in sub-s. 2 : " The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act." Therefore, the fact that the covering deed goes much further than the Act does not in any way affect its validity ; but the result is that the 6th article of the deed which I have last read goes a great

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

NORTH J.
1896
RICHARDS
v.
OVERSEERS
OF KIDDER-
MINSTER.
RICHARDS
v.
MAYOR OF
KIDDER-
MINSTER.

deal further than the provision in the Act, that the receiver shall be deemed to be the agent of the mortgagor; and, in my opinion, the provision in the Act that the receiver shall be deemed to be the agent of the mortgagor does not apply here, because there is an express provision as to the receiver taking possession from the company in the deed itself.

The question, then, is what the construction of the deed is; and it is said that under the deed, as under the Act, the receiver was merely the agent of the mortgagor, and therefore the mortgagor continued in possession, and there was no change in possession. But in my opinion that contention is not sound. It is quite clear that the provisions of the deed do contemplate, in a particular event, and at a particular time, that there either may or shall be a change of possession, in which a receiver shall enter into possession and shall carry on the business of the company; and in my opinion the provision that the receiver is to be the agent for the mortgagor is not so strong as to stultify every other provision in the deed, which says that the possession of the company shall cease and shall become the possession of the receiver; and it also provides that if, when possession has been properly taken, the contemplated resolution should not be passed, then the parties are to be again in their old position—that is to say, the possession from that time forward is to be the possession of the company in this case, and under art. 6 is to be the possession of the mortgagor under the general provision of the Act.

In my opinion, therefore, it is impossible to say that the change of possession which was clearly contemplated and required by the deed did not take place. It is not true to say that the company were in the occupation throughout, because the receiver on behalf of the trustee—the trustee himself, if you like to say so, on behalf of the debenture-holders—was the person from that time forward in possession.

Then the question is what right he had, and what his interest in the personal chattels that he took possession of under the deed was. It is said that the deed was not a debenture, and therefore the Bills of Sale Acts in some way affect its operation. The deed never was registered under the Bills of Sale Act, and

therefore it is said that the debenture-holders have no rights as creditors under the deed.

Now, first of all, as regards this covering deed: Is it a debenture or not? According to the decisions of Chitty J. in *Edmonds v. Blaina Furnaces Co.* (1) and *Levy v. Abercorris Slate and Slab Co.* (2), he, I will not say defined what a debenture was, but he pointed out some of the qualities or attributes of a debenture; and if his opinion was right, I do not see why the covering deed in the present case should not be a debenture also. On the other hand, Field J., in a case cited of *Brocklehurst v. Railway Printing and Publishing Co.* (3), held that a covering deed was not a debenture; and in the case of *Ross v. Army and Navy Hotel Co.* (4) the Court of Appeal certainly did proceed on the admission of the parties that the covering deed was not a debenture, and they considered the further question as to whether what I may call the real debentures secured by the covering deed were debentures or not. As regards that question, however, I do not think it necessary to come to a decision, and I will not in that conflict of authorities say whether the covering deed is a debenture or not; for it does not seem to me material whether it is or not, because I think it is quite clear on the authorities the covering deed is not a bill of sale that did require registration.

It seems to me that the case settling the matter is the later decision of the Court of Appeal in *In re Standard Manufacturing Co.* (5), where the matter was fully considered. It is sufficient, I think, for me to read the head-note, as bearing on this point, and it is fully borne out by the judgment, which I have carefully considered: "The mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not, upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act." Now, this covering deed is beyond all question a deed for the registration of which provision

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

(1) 36 Ch. D. 215.

(3) W. N. (1884) 70.

(2) 37 Ch. D. 260.

(4) 34 Ch. D. 43.

(5) [1891] 1 Ch. 627.

NORTH J.
 1896
 RICHARDS
 v.
 OVERSEERS
 OF KIDDER-
 MINSTER.
 ———
 RICHARDS
 v.
 MAYOR OF
 KIDDER-
 MINSTER.
 ———

is made by the Companies Act, 1862, and I think I was told it had actually been registered. If not, it ought to have been registered. That case seems to me to be exactly in point. I must hold that the covering deed, therefore, itself was not a bill of sale, looking at that authority. The head-note says: "Are not, upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act." That was not the only point decided, because Bowen L.J., who gave the judgment of the Court, said at the beginning of his judgment (1): "The question we have to decide is whether both or either of the debentures before us, which are in fact debentures of a joint stock company limited, and which create a charge on the floating real and personal property of the company, are void for non-registration under the Bills of Sale Acts, 1878 or 1882, or either of such Acts. So far as the Bills of Sale Act of 1882 is concerned, it seems to us that such debentures are expressly excepted from its operation by s. 17." The rest of the judgment deals only with the Act of 1878, simply because the Act of 1882 had been disposed of in those words at the beginning of the judgment; but beyond that it seems to me that the decision as to the Act of 1878 covers the present case, because all bills of sale under the Act of 1882 are bills of sale under the Act of 1878; though it is not the case that all bills of sale under the Act of 1878 are within the Act of 1882; but, on the other hand, the converse is the case; and therefore, if this is not a bill of sale under the Act of 1878, it is not under the Act of 1882, which is a supplemental Act to the principal Act, and, by the 3rd section of the latter Act, the two are to be read as one.

There is one other case I wish to refer to, where *In re Standard Manufacturing Co.* (2) was followed. In the case of *In re Opera, Limited* (3), I read from the head-note: "The sheriff, on seizing, on behalf of an execution creditor, goods belonging to a limited company, takes—at all events before sale by him—subject to the rights of debenture-holders under debentures charging all the property of the company as security

(1) [1891] 1 Ch. 644.

(2) [1891] 1 Ch. 627.

(3) [1891] 3 Ch. 260.

for the debenture debt." There it was held that the charge created by debentures had priority over the rights of the sheriff in execution. It seems to me that the right created by the debentures is equally effective against a distress—not, indeed, by a landlord, because that is not the case we are dealing with—but a distress under a power to distrain which is to be exercised by the Act over the company's goods. It seems to me that, the debenture being a good charge upon the goods, no distress can be made upon them, except, as this case says, subject to the rights of the debenture-holders.

Then, in addition to that, there is this point: that, even if the covering deed was a bill of sale which was invalid as not being registered, yet the debentures proper, to cover which the security was created, are, beyond all question, debentures; and they are expressed in terms which give a charge. The debenture, a form of which is provided for by the covering deed, contains a provision that "the company doth hereby, as beneficial owner, charge with the payments hereby, or by the conditions indorsed hereon, provided for its undertaking, and all its property whatsoever, both present and future, except uncalled capital," all of which is referred to as "the said property." That being so, an argument that was founded upon s. 14 of the Bills of Sale Act, 1882, has no application. That section provides: "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates." That is to say, a bill of sale to which this Act applies shall be no such defence; but as, in my opinion, neither the debentures nor the covering deed are within the Act at all, the benefit conferred by s. 14 has no application, because it is confined to bills of sale to which the Act does apply. Under those circumstances, the money must be paid to the receiver.

Then, as regards the second case in the paper for judgment, I was told that that was altogether the same as the one in which I have just given judgment, excepting that in one respect it was more favourable to the plaintiff. I need not go into that

NORTH J.

1896

RICHARDS

v.

OVERSEERS
OF KIDDER-
MINSTER.

RICHARDS

v.

MAYOR OF
KIDDER-
MINSTER.

NORTH J. question, or consider whether it is or not. The grounds on
 1896 which I have decided the first are quite sufficient for deciding
 ~~~~~ the second, and the order in that case will be for payment of  
 RICHARDS the agreed sum to the plaintiff also. The costs must follow  
 v. the event.  
 OVERSEERS  
 OF KIDDER-  
 MINSTER.

RICHARDS Solicitor for plaintiff: *J. W. Miles.*

v. Solicitor for defendants in both actions: *L. W. Wigg, for*  
 MAYOR OF *F. E. Burcher, Kidderminster.*  
 KIDDER-  
 MINSTER.

D. P.

NORTH J.

HUNT *v.* WORSFOLD.

1896

[1896 H. 417.]

~~~~~  
 April 28.

*Practice—Action for Recovery of Land—Joinder of other Cause of Action—
 Leave of Court—Waiver of Irregularity—Rules of Supreme Court, 1883,
 Order XVIII., r. 2; Order LXX., r. 2.*

The plaintiff claimed a declaration that an alleged mortgage of land to the defendant created no charge on the land comprised in it, and he claimed possession of the land. The plaintiff claimed alternatively an account of what was due on the mortgage, and redemption. The plaintiff was a judgment creditor of the mortgagor; he had obtained an order appointing him receiver of the rents of the land, and the order had been registered. On a summons by the defendant to stay all proceedings in the action, on the ground that no leave of the Court had been obtained to join another cause of action with the action for the recovery of the land:—

Held, that, though the defendant had entered an appearance to the writ, it was not too late for him to take the objection: but

Held, that the plaintiff was entitled without leave to ask for possession of the land in either alternative—immediate possession if the mortgage was invalid, and possession on payment of what should be found due if the mortgage was valid.

Mulckern v. Doerks (53 L. J. (Q.B.) 526) is overruled by *Wilmott v. Freehold House Property Co.* (51 L. T. (N.S.) 552) and *Smurthwaite v. Hannay* ([1894] A. C. 494).

SUMMONS by the defendant asking that all proceedings in the action might be stayed, on the ground that no leave was obtained to join the other causes of action with the action for the recovery of land, or, in the alternative, that the statement of claim might be struck out or amended, on the ground that the

same was embarrassing, and upon the further ground that, so far as the same claimed redemption, the mortgagor had not been made a party to the action. NORTH J.

The writ was issued on February 3, 1896. By the indorsement the plaintiff claimed in substance the same relief as he claimed by the statement of claim which he afterwards delivered.

1896
HUNT
v.
WORSFOLD.
—

The defendant entered an appearance.

The statement of claim delivered on February 22, 1896, contained the following allegations:—

The plaintiff on November 4, 1895, recovered judgment in an action in the Queen's Bench Division against J. R. Worsfold for 800*l.* and costs.

On December 18, 1895, the plaintiff was by an order in that action appointed receiver of the rents of two houses at Redhill belonging to J. R. Worsfold.

On December 30, 1895, the order for a receiver was duly registered. The plaintiff's statement proceeded as follows:—

“The defendant states that by a deed, purporting to be a deed of mortgage and alleged to have been made on May 27, 1895, between the said J. R. Worsfold and the defendant, the said J. R. Worsfold purported to mortgage the said two houses to the defendant for the sum of 171*l.* in the said deed alleged to have been due from the said J. R. Worsfold to the defendant on an account stated, and the defendant agreed to pay a further sum of 10*l.* 10*s.* to the said J. R. Worsfold.

“The defendant never lent the said J. R. Worsfold the sum of 171*l.* or the sum of 10*l.* 10*s.*, and the said J. R. Worsfold was never indebted to the defendant in the sum of 171*l.* on an account stated, or in the sum of 10*l.* 10*s.*

“The said mortgage deed is wholly fictitious, and, without consideration, procured by the defendant (if the said deed was ever executed by the said J. R. Worsfold, which the plaintiff denies) with intent to obtain possession of the said houses and the title-deeds relating thereto.

“The defendant is in possession of the said houses and title-deeds, and refuses to give up possession though requested so to do.

NORTH J. “The plaintiff claims—(1.) A declaration that the alleged
 1896
 HUNT
 v.
 WORSFOLD.
 —
 mortgage deed made between J. R. Worsfold and the defendant on May 27, 1895, constitutes no charge on the houses or on the property comprised in the said deed. (2.) Possession of the said houses and property and deeds relating thereto. (3.) Alternatively (so far as the said alleged mortgage deed may be held to be a charge on the said houses and property) for an account of what is due thereon and redemption.”

A. Beddall, for the defendant. There is no objection to the plaintiff's joining his first claim for a declaration of the invalidity of the mortgage with his second claim for possession of the houses. But the third claim for redemption is an entirely separate and distinct cause of action, and by rule 2 (1) of Order XVIII. it cannot be joined with the claim for possession without the leave of the Court obtained before the issue of the writ.

P. S. Hickey, for the plaintiff. It is too late to take this objection after the defendant has entered an appearance. The entry of appearance is a “fresh step” within Order LXX., r. 2: *Mulckern v. Doerks* (2); *Tozier v. Hawkins*. (3) The entry of a conditional appearance is not taking a “fresh step,” but the entry of an ordinary appearance is.

A. Beddall, for the defendant. An improper joinder of causes

(1) By Order XVIII., r. 2, “No cause of action shall unless by leave of the Court or a judge be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed.

“Provided that nothing in this order contained shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for deli-

very of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption, as the case may be, and such an action for foreclosure or redemption and for such delivery of possession shall not be deemed an action for the recovery of land within the meaning of these rules.”

Order LXX., r. 2: “No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.”

(2) 53 L. J. (Q.B.) 526.

(3) 15 Q. B. D. 650.

of action is not an "irregularity" within rule 2 of Order LXX.: **NORTH J.**
Wilmott v. Freehold House Property Co. (1); *Smurthwaite v.* 1896
Hannay. (2) As Lord Herschell said in the latter case (3), if HUNT
 this joinder of causes of action is "unwarranted by any enact-
 ment or rule" it is "much more than an irregularity." In v.
Read v. Wotton (4) a similar objection was allowed to be taken WORSFOLD.
 after the delivery of a statement of claim. *Mulckern v.*
Doerks (5) must be taken to have been overruled.

P. S. Hickey, in reply. In *Wilmott v. Freehold House Property Co.* (1) the decision was only that the defence was not embarrassing. It would be too late to take the objection at the trial of the action: *In re Derbon.* (6) *Smurthwaite v. Hannay* (2) does not apply. The question there was as to the joinder of several plaintiffs in respect of separate causes of action.

NORTH J. It seems to me that the decision in *Mulckern v. Doerks* (5) is inconsistent with what was done in *Wilmott v. Freehold House Property Co.* (1) and *Smurthwaite v. Hannay.* (2) I cannot, therefore, say that the defendant is too late in taking the objection.

A. Beddall, for the defendant. The two causes of action are entirely distinct, and their joinder must be very embarrassing to the defendant. In an action for the recovery of land the defendant is only bound to plead that he is in possession. The leave of the Court cannot be given after the writ has been issued: *In re Pilcher.* (7) In *Gledhill v. Hunter* (8) it was held that an action to establish title to land, not claiming possession, is not an action for the recovery of land, so as to require the leave of the Court for its joinder with another cause of action. There was only one cause of action in that case; here there is a distinct and separate cause of action besides the claim to recover the land.

P. S. Hickey, for the plaintiff, was not called upon.

(1) 51 L. T. (N.S.) 552.

(2) [1894] A. C. 494.

(3) Ibid. 501.

(4) [1893] 2 Ch. 171.

(5) 53 L. J. (Q.B.) 526.

(6) 36 W. R. 667.

(7) 11 Ch. D. 905.

(8) 14 Ch. D. 492.

NORTH J. NORTH J. The plaintiff asks for a declaration that the mortgage deed constitutes no charge upon the houses and property comprised in it, and it is admitted that this claim has been properly joined with the claim for recovery of possession of the property. For this purpose the plaintiff must be treated as the owner of the property, and he wants to have the mortgage put out of his way. Then, in the alternative, he asks, so far as the mortgage deed may be held to be a charge on the property, for an account of what is due on the mortgage and for redemption. The plaintiff has joined in one action two claims each of which would be perfectly good if it stood alone. He wants to obtain possession of the land if there is no mortgage, and he equally wants to obtain possession if there is a valid mortgage. In either case he asks for possession—possession at once if there is no valid mortgage, and possession upon payment of what may be found due if the mortgage is valid. It is true that he does not in the latter event ask for possession in express terms, but I think he does ask it in substance. As he is entitled without any leave to ask for a declaration that the mortgage deed is invalid, I think he is equally entitled to ask in the other alternative for possession of the land upon payment of what may be found due on the mortgage.

[His Lordship then held that the mortgagor ought to be a party to the action, and made an order staying proceedings until he should have been added as a party.]

Solicitors: *A. M. Bradley; Morrisons.*

W. L. C.

In re HELLARD & BEWES.

NORTH J.

Solicitor—Costs—Taxation—Costs of Taxation—Lease at Rent and Premium
--Minimum Scale Charge—General Order under Solicitors' Remuneration Act, 1881, Sched. I., Part I., rr. 7, 8; Part II., r. 5.

1896

April 28, 30.

A lease for ninety-nine years, determinable on three lives, was granted at an annual rent of 12s. 1d. and a premium or fine of 12l. 1s. 8d.:—

Held, that the lessor's solicitors were entitled to a fee of 5l. in respect of the rent under Sched. I., Part II. (second scale), to the General Order under the Solicitors' Remuneration Act, 1881, and to an additional fee of 3l. in respect of the premium by virtue of rule 5 in Part II. and rule 8 in Part I. of Sched. I.

The lessor's solicitors wrote on December 24 to the lessee's solicitors that their charges in relation to the lease amounted to 7l. 11s. On January 1 the lessee's solicitors wrote asking for particulars of the charges. In reply the lessor's solicitors on January 2 sent a bill with detailed items, amounting to 10l. 10s. 8d., adding at the foot, "Say 7l. 11s." The lessee obtained an order to tax the bill, and on the taxation the whole of the 7l. 11s. was allowed:—

Held (affirming the decision of the taxing master), that the bill was delivered on December 24; that the bill sent on January 1 was merely explanatory; and that, the bill not having been reduced on taxation, the solicitors were entitled to the costs of the taxation.

SUMMONS by a lessee to review the taxation of the bill of costs of Messrs. Hellard & Bewes, the lessor's solicitors, in relation to the renewal of a lease for lives.

The renewed lease was for a term of ninety-nine years, determinable on three lives, at an annual rent of 12s. 1d. and a premium or fine on renewal of 12l. 1s. 8d.

On December 24, 1895, Messrs. Hellard & Bewes wrote to the lessee's solicitors:—

"Herewith counterpart lease for signature by the lessee.

"The renewal expenses are as follows:—

					£	s.	d.
Fine	.	.	.	.	12	1	8
Heriot	.	.	.	.	1	4	2
Lease	.	.	.	.	7	11	0
					<u>£20 16 10."</u>		

NORTH J. On January 1, 1896, the lessee's solicitors wrote to Messrs. Hellard & Bewes :—

1896

In re

HELLARD
& BEWES.

"We have obtained the execution of the mortgagee to the counterpart lease herein, but before writing the mortgagor for the amount payable on completion we shall be glad to have particulars of your charges for the lease and counterpart amounting to 7*l.* 11*s.* 0*d.*, as it appears to us that that amount exceeds the full scale costs to which you are entitled."

On January 2, 1896, Messrs. Hellard & Bewes replied :—

"Herewith as requested we send our bill shewing how the 7*l.* 11*s.* is arrived at."

The bill sent with this letter contained two items of 1*l.* 13*s.* 4*d.* and 13*s.* 4*d.* respectively. There was then a third item, "To professional charges drawing and completing lease and counterpart (3*l.* in respect of premium, and 5*l.* in respect of rent) 8*l.*," and a fourth item, "Stamps on lease and counterpart 4*s.*," making a total of 10*l.* 10*s.* 8*d.* Under this total was added, "Say 7*l.* 11*s.*"

On January 17, 1896, the lessee obtained an order of course for the taxation of the bill, which was stated in the order to have been delivered on January 3.

The taxing master was of opinion that the solicitors were, under the General Order under the Solicitors' Remuneration Act, 1881, entitled to charge a fee of 8*l.* (1), and as they had

(1) The material parts of the General Order are as follows :—

Sched. I., Part I. contains

"Scale of Charges on Sales, Purchases and Mortgages, and Rules applicable thereto."

The scale provides (inter alia)

"Vendor's solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)," for the first 1000*l.* a fee of 30*s.* per 100*l.*

By rule 7, "Fractions of 100*l.* under 50*l.* are to be reckoned as 50*l.*"

Rule 8: "Where the prescribed

remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor or mortgagee is to be 3*l.*"

Part II. of Sched. I. (second scale) provides a

"Scale of charges as to conveyances in fee, or for any other freehold estate, reserving rent, or building leases reserving rent, or other long leases not at rack-rent (except mining leases) or agreements for the same respectively."

The scale prescribes for "vendor's or lessor's solicitor for preparing,

claimed only 7*l.* 11*s.* he allowed that sum. He was also of opinion that the bill which he was taxing was a bill of 7*l.* 11*s.* delivered on December 24, and that the bill with items sent on January 2 was only "an explanation in detail of that for which the solicitors had previously charged 7*l.* 11*s.* in a lump sum." He therefore held that, as the bill had not been reduced on taxation, the solicitors were entitled to the costs of the taxation.

NORTH J.

1896

In re
HELLARD
& BEWES.

F. Thompson, for the lessee. The solicitors are entitled, under the second scale in Part II. of Sched. I. to the General Order, to a fee of 5*l.* in respect of the rent, and also, by rule 5 in that schedule, to a fee in respect of the premium equal to the fee on a purchase at a price equal to the premium. The solicitors are entitled to this fee, even though no abstract of the lessor's title is furnished: *In re Robson*. (1) The scale in Part I. of Sched. I., coupled with rule 7 in that Part, shews that the premium fee is 15*s.*, and when that is added to the 5*l.* in respect of the rent the remuneration exceeds 5*l.*; so that rule 8 in Part I., which prescribes a minimum remuneration, does not apply. "Prescribed remuneration" in rule 8 means the remuneration prescribed in relation to the particular transaction. The Rules in Part I. apply to Part II.; they are not limited in their application as those in Part II. are. There is only one transaction; the fact that there is a premium does not increase the work which the solicitor has to do: *In re The Onward Building Society* (2); *In re Field*. (3) There are not to be two minimum fees in respect of one transaction.

Upjohn, for the solicitors, was not called upon.

settling, and completing conveyance and duplicate, or lease and counterpart," where the amount of annual rent does not exceed 5*l.* a remuneration of 5*l.*

Rule 5: "Where a conveyance or lease is partly in consideration of a money payment or premium, and

partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium."

(1) 45 Ch. D. 71.

(2) [1893] 1 Q. B. 16.

(3) 29 Ch. D. 608.

NORTH J.

1896

*In re*HELLARD
& BEWES.

NORTH J. I think the taxing master's decision quite right. There is a renewed lease for ninety-nine years or three lives at an annual rent of 12s. 1d., and a fine of 12l. 1s. 8d.; the lessor's solicitors are to be paid by scale; and the question is, What is the proper scale charge?

A conveyance of this kind comes under Part II. of Sched. I. to the General Order under the Solicitors' Remuneration Act, the second scale of which provides a "scale of charges as to conveyance in fee, or for any other freehold estate, reserving rent, or building leases reserving rent, or other long leases not at rack-rent." This renewed lease is not at a rack-rent. Then what is the remuneration to be paid? First of all there is "vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart." On the "amount of annual rent, where it does not exceed 5l.," the amount of remuneration is 5l. In this case the rent is less than 5l.; therefore 5l. is the remuneration in respect of it. Then in the same part of Sched. I. there are "rules applicable to Part II. of Sched. I. as to all leases or conveyances at a rent." Rule 5 is important: [His Lordship read it.] The remuneration in respect of the rent is 5l.; and rule 5 says that in addition to that there is to be paid a further sum equal to the remuneration on a purchase at a price equal to 12l. 1s. 8d. That carries us back to Part I. of Sched. I. Part I. prescribes a "scale of charges on sales, purchases, and mortgages." The scale provides for the "vendor's solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance, for the first 1000l., 30s. per 100l." That would make the remuneration 30s. on a purchase at the price of 12l. 1s. 8d. But rule 7 in Part I. says: "Fractions of 100l. under 50l. are to be reckoned as 50l." Therefore, the 12l. 1s. 8d. is to be reckoned as 50l.; and the scale charge payable in respect of the premium would be half of 30s.—that is, 15s. But then comes rule 8: [His Lordship read it.] Therefore, to find what is to be added to the remuneration in respect of the rent of 5l., we are referred back to Part I. of Sched. I., and there we find that the sum to be added would be 15s., but for rule 8, which says that when the transaction is under 100l.

(which is the case here) the solicitor's remuneration is to be 3*l*. Having therefore exhausted Part I. and the rules in it, and having arrived at 3*l*. as the remuneration on a purchase at a price equal to the present, we go back to rule 5 in Part II. of Sched. I., and add that 3*l*. to the remuneration in respect of the rent, which is 5*l*. This makes the total remuneration 8*l*. That is what the taxing master has allowed, and I think he is right.

Mr. Thompson's argument comes in effect to this: having got 5*l*. from Part II. of Sched. I. in respect of the rent, and 15*s*. from Part I. in respect of the premium, we are to leave Part I. and go back to Part II., bringing the 15*s*. from Part I., which is to be added to the 5*l*. from Part II.; and then, having done that and arrived at the total, we are to go back again to Part I. for the purpose of seeing whether rule 8 applies, that being a rule which is not applicable to this compound sum at all. It is a rule relating to the "scale of charges on sales, purchases, and mortgages," and to nothing else, and the reference to it has answered its purpose when, by means of that reference, we have calculated the sum which has to be introduced under rule 5 in order to arrive at the two sums which are to be added together to make up the total remuneration.

In my opinion, the taxing master's view was quite right.

F. Thompson, for the lessee. The taxing master ought to have ordered the solicitors to pay the costs of the taxation. He was wrong in holding that the bill was delivered on December 24. The bill which he was taxing was the bill with items which was delivered on January 3, and this is so stated in the order for taxation. More than one-sixth was taxed off that bill. A solicitor who delivers a bill of a specified amount cannot, when the bill has been reduced by more than one-sixth, escape paying the costs of taxation because he offered to take less than the amount: *In re Carthew*. (1) *Re Tilleard* (2) and *Re Russell, Son & Scott* (3) are distinguishable.

Upjohn, for the solicitors, was not called upon.

(1) 27 Ch. D. 485.

(2) 32 Beav. 476.

(3) 55 L. T. (N.S.) 71.

NORTH J.

1896

In re
HELLARD
& BEWES.

NORTH J. NORTH J. I think the taxing master has come to the right conclusion upon this point also. [His Lordship referred to the correspondence, and continued:—]

1896

In re

HELLARD
& BEWES.

Although the solicitors were to be remunerated by a scale charge, it is clear that a bill might properly have been delivered and been asked for, because clause 4 of the General Order provides: "The remuneration prescribed by Sched. I. to this Order is not to include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses," and a number of other matters. Therefore it is quite clear that the bill which would have to be made out by the solicitor would include, first, the scale charge, and, secondly, whatever sums in respect of stamps, counsel's fees, auctioneer's charges, and so on would properly be charged against the person who had to pay the bill; and in the present case, as there was an extra charge of 4s. for stamps, it is clear that there might be a bill made out containing the scale charge and the extra charge for stamps. The lessee suggested that the charge of 7*l.* 11s. was too large, and obtained an order of course to tax the bill. The amount in dispute was a very small sum—only 2*l.* 5s.—but, as Mr. Thompson says, it is a matter of principle which may affect a good many transactions in that part of the country in which the property is situate, and the applicant was quite entitled to bring the matter before the Court. He had the inclosure which in the letter of January 2 is called a "bill," and on January 17 he obtained an order of course to tax that bill, the order stating that the solicitors "on or about January 3, 1896, delivered to the petitioner their bills of fees and disbursements." The view which the taxing master took was that the bill which he was taxing was the letter of December 24 containing the charge of 7*l.* 11s., and that the document delivered on January 3 was an explanatory list of items, furnished in order to justify the charge in the bill. If that were the true view of the case, the order ought not to have been an order of course to tax the explanatory list, which was not a bill. But the taxing master seems to have ignored that irregularity, and the parties have ignored it now, and I take it, therefore, that no question of irregularity in the order arises, but that the taxing

master rightly proceeded to deal with the matter under the order. He came to the conclusion that the letter of December 24 was really the bill, and that letter said that 7*l.* 11*s.* was the solicitors' charge for the lease. He rightly held that that was less than what they might have charged under the scale, namely, 8*l.* and 4*s.* for stamps. He therefore allowed the whole of the 7*l.* 11*s.* Then it is said that the list of items was really the bill, as the letter of January 2 called it; that this is what ought to have been taxed; and that when it was taxed, the amount, 10*l.* 10*s.* 8*d.*, being reduced to 7*l.* 11*s.*, i.e., by more than one-sixth, the solicitors ought to bear the costs of the taxation. If the taxing master's view is right, 7*l.* 11*s.* was the amount of the bill, and it was taxed at 7*l.* 11*s.*, nothing being taken off. I think the taxing master was right. The 7*l.* 11*s.* was sent as the amount of the solicitors' charge. When items were asked for, shewing how the charge was made out, items were sent to justify the amount. In the list of items which was sent the total as added up made 10*l.* 10*s.* 8*d.*, and immediately below that total was written, "Say 7*l.* 11*s.*" I understand that note when expanded to mean, "Our charge if made by items would amount to 10*l.* 10*s.* 8*d.*, and that is more than the 7*l.* 11*s.* which we have already stated to be our whole claim in respect of the business comprised in this bill." I think, therefore, that the taxing master was justified in saying that the 7*l.* 11*s.* was the bill actually claimed; and, although the mistake of treating the other document as the bill is perfectly intelligible now, yet it was a mistake, because the letter of December 24 was the bill. That being so, *Re Tilleard* (1) and *Re Russell, Son & Scott* (2) exactly apply, and I think the taxing master was right in following those cases.

Solicitors: *Law & Worssam; Bell, Brodrick & Gray.*

(1) 32 Beav. 476.

(2) 55 L. T. (N.S.) 71.

NORTH J.

1896

In re

HELLARD
& BEWES.

STIRLING J.

In re KÖNIG & EBHARDT'S APPLICATION.

1896
Feb. 28;
March 6.

Trade-mark—Registration—Restrictions upon—“Representations of the Royal Crown”—Instructions issued by Comptroller to Persons wishing to Register Trade-marks.

There is no positive rule binding upon the Court or the Board of Trade prohibiting the registration of a trade-mark containing the representation of a crown. The instructions issued by the Comptroller-General of Trade Marks to applicants for registration, containing a regulation that “representations of the Royal Crown” will not be registered as trade-marks or as prominent parts of trade-marks unless the marks have been used before August 13, 1875, do not prohibit every form of crown, but only representations of the Crown as it appears on the Royal Arms, namely, a circlet surmounted by two arches.

Whether these instructions are binding upon the Court or not, the practice in the Trade Mark Office, which has been based upon them since 1875, ought not now to be departed from.

MOTION.

This was an application by Messrs. König & Ebhardt asking that the Comptroller-General of Trade Marks might be directed to proceed with the registration of their trade-mark.

The applicants were a German firm who, down to the date of their application, had carried on business in Germany, where they had used the mark which they now desired to register in this country. It consisted of a shield, bearing a floral device and the words “*Urbi et orbi*,” the whole being surmounted by the representation of a crown or coronet.

The original application was in Form F of the first schedule to the Patents, Designs, and Trade Marks Act of 1883, and by it the comptroller was asked to register the mark in class 39 in respect of (A) account books, stationery, &c.; but the application was afterwards modified in certain particulars.

Upon receipt of the application the comptroller drew the attention of the applicants to other similar marks upon the register, and required the representation of the crown to be removed. The applicants answered that their trade-mark had been the coat-of-arms of the Ebhardt family for several centuries, and that the representation of the crown was not that of the

Royal Crown, but what was known in Germany as a patrician's STIRLING J. crown. The comptroller nevertheless insisted (*inter alia*) upon the removal of the crown from the mark.

The reasons for his refusal of the application were thus stated in a letter which he wrote to the applicants on May 6, 1895: "The reasons why I refuse to proceed with your application so long as the device above the shield remains part of the proposed mark are—first, because of the similarity of the device in question to the Royal Crown; and, secondly, under s. 72 of the above-mentioned Acts, in view of the following previous trade-marks." Then followed a list of similar trade-marks already on the register for class 39.

Upon the refusal of the application by the comptroller, the applicants appealed to the Board of Trade, who referred the matter to the Court, and directed that notice of the application should be given to the owners of the marks already on the register, some of whom were to be at liberty to appear at the hearing.

The applicants thereupon wrote to the various owners of the marks in question with a view to ascertaining whether they desired to be served with notice of the proceedings; and a correspondence ensued, the result of which was that some of the owners made no objection to the proposed registration, others agreed to it on condition that the applicants undertook not to use their mark for particular kinds of goods, and others left the matter to the discretion of the Court.

No rules applicable to the question of the use of the crown had ever been made by the Board of Trade; but printed instructions had been issued by the comptroller and acted upon in the Office of Trade Marks since 1875. The instructions were as follows:—

"Instructions to persons who wish to register trade-marks:

"Restrictions on Registration.

"30. The following will not be registered as trade-marks, or as prominent parts of trade-marks, unless the marks have been used before 13th August, 1875:—

"The Royal Arms, or arms so nearly resembling them as to be calculated to deceive.

1896

In re

KÖNIG &
EBHARDT'S
APPLICATION.

STIRLING J. "Representations of Her Majesty the Queen or of any member of the Royal Family.

1896

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In re

KÖNIG &
EBHARDT'S
APPLICATION.

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"Representations of the Royal Crown.

"The National Arms or Flags of Great Britain."

Moulton, Q.C., and *Whinney*, for the applicants. The refusal of the comptroller to register our mark on the ground that it contains a representation of the Royal Crown is not justified. The mere use of a crown as a part of a trade-mark does not come within the mischief of s. 106 of the Patents, Designs, and Trade Marks Act, 1883. That section only deals with the use of the Royal Arms, and has no application to the question of registration.

[*Sir R. E. Webster, A.-G.* The comptroller does not rely upon that section.]

The Board of Trade, who alone have the power of making rules under s. 101 for the registration of trade-marks, have made no rule which is applicable to this case. The "instructions" relied upon by the comptroller were not issued by the authority of the Board of Trade, and are not binding on the Court.

No doubt the comptroller has a discretion to refuse registration under ss. 62 and 72; but he has no right to make a rule that he will refuse to register all marks containing certain devices. If the comptroller objected to our mark on the ground that the crown was so used as to cause confusion between it and other marks, that would be a case which we should not contest.

But even if the "instructions" are valid and binding, our mark does not offend against them because they are directed solely against the use of the Royal Arms and representations of the Royal Crown, and our crown is not like the Royal Crown.

Sir R. E. Webster, A.-G., and *Ingle Joyce*, for the comptroller. For all practical purposes the applicants' mark contains a very good representation of the Royal Crown. It is very similar to the crown which is used on various coins of the realm and upon postal orders. For many years attempts have been made to obtain registration of marks containing the Crown, and the

practice of the office, which has been settled since 1875, is based STIRLING J. upon these attempts. No doubt the practice has not been adhered to so strictly as it might have been, and some marks containing the Crown have got upon the register; but most of these were old marks. Many other marks, moreover, have been refused on the same grounds, and any further departure from the rule would not be fair to previous applicants.

1896
In re
 KÖNIG &
 EBHARDT'S
 APPLICATION

This is a matter for the discretion of the comptroller (s. 62, sub-s. 4), and the Court will not lightly interfere with the exercise of that discretion. It is not disputed that taken as a whole the mark is a distinctive device within s. 64, sub-s. 1 (c); but the question is whether the crown can be considered part of it. The crown itself is not a distinctive device, but a common particular which may be added, but must be disclaimed under s. 74 of the Act of 1883, as amended by s. 16 of the Act of 1888.

No doubt the mark must be looked at as a whole; but, having regard to the claim to include the crown as part of it, this is a case in which registration ought to be refused under s. 72 on the ground of resemblance to other marks already on the register. It is inconvenient that the result of private agreements with other firms and undertakings given to them should appear upon the register. The question is a public one, and it is more in accordance with the statute that the comptroller should refuse registration in such a case.

The use of the Royal Crown suggests superiority of the goods upon which it appears, and it ought not to be used as part of a trade-mark. The comptroller has exercised a wise discretion; and if the Court thinks fit to review that exercise it is desirable that some rule should be laid down which will guide the office in future.

Moulton, Q.C., in reply. The suggestion that the applicants desire to use the crown for the purpose of falsely representing the quality of their goods is not justified. The mark has been used by them in Germany for many years, and they only desire to have it registered here, as they are entitled to under s. 103 and the International Convention. They are willing to disclaim the right to the exclusive use of the crown and the words

STIRLING J. "Urbi et orbi." This is a compound design, and the crown is only an element of it, and it is immaterial that that element has been used before. The additions which may be made under s. 74 are things which are not part of the mark at all.

1896

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*In re*

KÖNIG &  
EBHARDT'S  
APPLICATION.

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March 6. STIRLING J., after stating the facts and dealing with the objection as to the similarity of the applicants' mark to others already on the register, continued:—I now come to consider the other objection—namely, the similarity of the device to the Royal Crown. As was pointed out by the applicants, there is no positive rule which is binding on the Court or the Board of Trade in reference to the matter; but in all the instructions which have from an early date been issued by the comptroller to persons intending to apply for registration of trade-marks, there have been provisions on this subject. These instructions have been perfectly well known to all applicants for trade-marks ever since 1875; they have been largely acted upon, and it appears from the evidence that trade-marks have been refused to be registered on the ground that a representation of the Royal Crown formed part of the design; and whether or not these instructions are absolutely binding on the Court, I should be slow to depart from a practice which has been established now for twenty years. If I said that that practice ought now to be departed from, many persons who have abstained from using a Royal Crown would justly feel aggrieved at the decision. I do not, therefore, propose to decide this case on the ground that there ought to be any departure from these instructions. I was not really asked to depart from the instructions. What was contended was that this was not a representation of the Royal Crown. What is a Royal Crown? It appears to me that it is that which appears on the Royal Arms, and is perfectly familiar to us all, and may be described as a circlet surmounted by two arches. The crown in this case has no arches at all—it closely resembles a marquis's coronet. If the instructions had extended to every form of crown, I should probably have held that registration ought not to be granted; but I have only to consider whether this so closely resembles a Royal Crown that it may be

mistaken for it, and I think it does not. I was referred to STIRLING J. representations of Her Majesty appearing on some of the current coins and on postal orders, where she is represented as wearing a circlet; but that is not what is usually called a Royal Crown. It was suggested by the counsel for the applicants, and if the comptroller desires it I think it would be right and proper, that there should be a disclaimer of the right to the exclusive use of the crown, and it may be a part of the terms that they should disclaim that and the use of the words "Urbi et orbi"; but, subject to the alteration to be made in the application and these disclaimers, I think the registration ought to proceed. It seems to me that the practice of the office has been in accordance with the view I have taken, because I find three coronets, not exactly the same as this, but very like an earl's coronet, which have been registered as trade-marks.

1896  
In re  
KÖNIG &  
EBHARDT'S  
APPLICATION.

Solicitors: *Gresham, Davies & Dallas; Solicitor to the Board of Trade.*

G. A. S.

BULKELEY v. STEPHENS.

STIRLING J.

[1860 B. 172.]

1896  
March 26;  
April 28.

*Apportionment—Tenant for Life and Remainderman—Stock in Public Company—Right of Estate of deceased Tenant for Life to Apportionment of Dividend partly earned before but declared after Death—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 3, 4, 5.*

Stock in a public company forming part of a testator's residuary estate was settled upon trust for A. for life, and after her death "to pay transfer and assign my residuary estate and the stocks funds and securities upon which the same shall be invested unto and amongst" certain beneficiaries. After the death of the tenant for life the stock was sold "cum dividend" under an order of the Court for the purpose of distribution. This order was made in the absence of the legal personal representatives of the tenant for life. After the sale a dividend was declared and received by the purchaser in respect of profits, a portion of which had been earned prior to the death of the tenant for life:—

*Held*, that the estate of the tenant for life was not entitled under the Apportionment Act, 1870, to be paid out of the purchase-money of the stock anything in respect of the dividend; but, inasmuch as if the trust had been strictly carried out in accordance with the terms of the will, by

STIRLING J.

1896

BULKELEY

v.

STEPHENS.

transferring the investments to the beneficiaries, the representatives of the tenant for life would have been in a position, either directly, or through the trustees, to obtain payment of an apportioned part of the dividend, their claim ought under the special circumstances of the case to be acceded to.

THIS was a summons taken out by Sir John Lubbock, the surviving trustee of the will of the late Mr. Stephen Lyne Stephens, asking that he might be at liberty, out of funds in his hands representing income of the testator's residuary estate, to pay to the legal personal representatives of the testator's widow, Yolande Marie Louise Lyne Stephens, a proportionate part of a certain dividend upon a sum of 12,000*l.* Royal Exchange Assurance Corporation Stock.

The testator, who died in 1860, by his will, dated in 1851, gave his residuary estate to trustees upon trust for conversion and investment and to pay the income arising therefrom to his wife for her life, and after her decease to pay, transfer, and assign his said residuary estate and the stocks, funds, and securities upon which the same should be invested unto and amongst such of the issue of four uncles of the testator therein named as should be living at her decease. And the testator declared that it should be lawful for his trustees to permit all or any part of his residuary personal estate to remain in or upon the same securities or state of investment in which it might be found at his decease for so long as they should in their discretion think proper.

The testator died on February 28, 1860, and his will was proved on March 29, 1860. On July 3, 1860, this suit was commenced for the administration of his estate; and by a decree dated February 9, 1861, certain accounts and inquiries were directed to be taken and made. Upon the taking of these inquiries it was found that there were in all ninety-three persons entitled in equal shares to the testator's residuary real and personal estate on the death of his widow.

Mrs. Lyne Stephens died on September 2, 1894.

At the death of the testator and at the death of his widow part of his residuary estate consisted of a sum of 12,000*l.* Royal



Exchange Assurance Corporation Stock. The accounts of this corporation are made up annually to December 31 in each year. For many years past an interim dividend of 4 per cent. in respect of the profits to December 31 has been declared at the preceding December 25, and a balance dividend has been declared in June in respect of the accounts made up to the preceding December 31.

STIRLING J.  
1896  
BULKELEY  
v.  
STEPHENS.

Upon November 12, 1894, an order was made upon the application of the trustees directing (inter alia) that they might be at liberty to sell the 12,000*l.* Royal Exchange Assurance Corporation Stock. In pursuance of this order the stock was, on January 29, 1895, sold "cum div." and the amount of the purchase-money paid into Court by the plaintiff; and, under an order dated June 8, 1895, the fund was divided into ninety-three shares and distributed amongst the persons entitled to the residuary estate.

In 1894 an interim dividend at the rate of 4 per cent., amounting to 480*l.*, was declared upon the 12,000*l.* Royal Exchange Assurance Corporation Stock in respect of the profits of the corporation from December 31, 1893, to December 31, 1894. This dividend was received by the plaintiff and was still in his hands.

In June, 1895, the corporation declared and paid a balance dividend of 10 per cent., amounting to 1200*l.*, on the 12,000*l.* stock in respect of the profits earned up to December 31, 1894. This dividend was paid to the purchasers of the stock. The price given for the stock included the profits earned thereon from December 31, 1893, to December 31, 1894, less the amount of the interim dividend of 480*l.*

The legal personal representatives of Mrs. Lyne Stephens claimed, under s. 5 of the Apportionment Act, 1870, to be paid a proportion of the interim dividend in respect of the period from December 31, 1893, to September 2, 1894. Their right to this payment was not disputed. They also claimed to be paid out of the purchase-money of the stock a like proportion of the balance dividend declared and paid in June, 1895, and this summons was taken out for the determination of the question whether they were so entitled.

STIRLING J. *Hastings, Q.C.*, and *T. T. Methold*, for the summons. The  
 1896  
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 BULKELEY
 v.
 STEPHENS.
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 dividend declared in June, 1895, partly represented profits earned before the death of Mrs. Lyne Stephens. Her estate, therefore, is entitled to a proportion of that dividend: Apportionment Act, 1870, s. 5.

The purchase-money received by the trustee was increased by the amount of the dividend which was in prospect at the time of the sale, and he is bound to account to the estate of the deceased tenant for life for so much of the purchase-money as represents dividend accrued before the death.

In *Freman v. Whitbread* (1) Kindersley V.-C. recognised the principle of the equity upon which the claim in that case was founded, and only declined to give effect to it on account of the inconvenience and expense which might be entailed upon trust estates by the introduction of the practice. But this case is concluded by the Act.

If, however, the Court should be of opinion that the Act does not apply, then we submit that the special circumstances of this case are such as to justify a departure from the general rule: *Lord Londesborough v. Somerville* (2) and *Bulkeley v. Stephens*. (3)

The trustee has distributed the fund representing the purchase-money of the stock; but there are other funds in his hands out of which the claim of the legal personal representatives may be satisfied. If the interest of the tenant for life can be defeated under such circumstances as exist in the present case, then the Act may be practically evaded.

[They also referred to *Bostock v. Blakeney*. (4)]

Buckley, Q.C., and *J. W. Baines*, for the persons interested in the residuary estate of the testator. The Apportionment Act does not apply. The trustee has not received any dividend which can be apportioned: *In re Clarke*. (5)

In the case of a sale and reinvestment, the tenant for life does not get anything in respect of dividend not declared at the time of the sale. The dividend on the new investment

(1) L. R. 1 Eq. 266.

(3) 3 N. R. 105.

(2) 19 Beav. 295.

(4) 2 Bro. C. C. 653.

(5) 18 Ch. D. 160.

might be apportioned, but not the purchase-money of the former STIRLING J. investment.

All that the tenant for life is entitled to is the apportioned part of the income. If there is no income, he gets nothing.

In *Lord Londesborough v. Somerville* (1) Lord Romilly M.R. did not follow the principles laid down by *Kindersley V.-C.* because of the existence of special circumstances. In the case of successive tenants for life, no doubt the Act would apply; but it only applies in any case to dividends actually paid.

It is suggested that the estate got an enhanced price for the stock in consequence of the dividend which was in prospect at the time of the sale; but in *Scholefield v. Redfern* (2) *Kindersley V.-C.* held that that argument could not apply even in the case of dividends payable *de die in diem*.

Hastings, Q.C., in reply. The Act does not affect the rights of tenants for life and remaindermen. All that it does is to give a right of action for a portion of accruing dividends. It gives the same remedy as to recovering an apportioned part of a dividend as exists in the case of the whole. The trustee has in point of fact received the dividend, and the estate of the deceased tenant for life is entitled to an apportioned part of it. It may be that he has received it in a different form, namely, in the form of an addition to the purchase-money of the stock.

Cases decided before the Act are not material. Before the Act it was a question of equity; it is now one of statutory right.

[STIRLING J. Has not the rule in *Freman v. Whitbread* (3) been applied ever since the Act was passed?]

Only because of the inconvenience of applying the principle of apportionment. That difficulty does not exist where the amount of the dividend is fixed and ascertained.

On September 3 the representatives of the tenant for life had a right to a portion of the dividend to be subsequently declared. That right was not destroyed by the sale which took place afterwards for the mere purpose of administration.

(1) 19 Beav. 295.

(2) 2 Dr. & Sm. 173.

(3) L. R. 1 Eq. 266.

STIRLING J. April 28. STIRLING J. (after referring to the facts). It is not disputed that the Royal Exchange Assurance Corporation is a public company within the meaning of s. 5 of the Apportionment Act, 1870, and that the interim dividend paid to the trustee of the testator's will previously to the sale of the stock is apportionable under that Act, and that a proper share of such interim dividend ought to be paid to the legal personal representatives of the tenant for life. But, as regards the dividend declared in June, 1895, it was contended in support of the application that the price received by the trustee for the stock included that dividend, and that so much of the price as represented the apportioned part of the dividend down to the death of the tenant for life ought to be paid to her legal personal representative. From an abstract point of view there is much to be said in favour of that contention, though in practice there are considerable difficulties in giving effect to it. A very similar point as to the apportionment of income on a change of investments was considered by Kindersley V.-C. in the cases of *Scholefield v. Redfern* (1) and *Freman v. Whitbread*. (2) In the former case the Vice-Chancellor said (3): "There is another question of a peculiar kind, and one which is novel to me. The point will be best explained by putting an example. Suppose part of the testator's property to consist of certain American stock, bearing interest or dividends payable at half-yearly periods, say January and July, and the trustees sell it in order to invest the proceeds in Consols, if they sell it at any other time than precisely the period at which a dividend has just accrued, the money realized by the sale is so much more in proportion to the time which has elapsed since the last dividend day. Therefore the amount realized by the sale is compounded partly of the value of the stock itself, and partly of the value of that proportionate part of the current half-year's dividend, which may be considered to have accrued since the last dividend day. It is contended that the tenant for life ought to have this latter portion as income. Now it is certain that in the multitude of cases of administration of estates in modern times where similar directions have

(1) 2 Dr. & Sm. 173.

(2) L. R. 1 Eq. 266.

(3) 2 Dr. & Sm. 182.

been given by testators, the Court has never been in the habit of administering any such equity. When we consider a little further, it is obvious, that if the tenant for life is to have something out of the sale money, as representing income, then when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way, and we ought to take from the tenant for life something of his next dividend on the Consols, and add that to the capital, in order to make things equal as between him and the remainderman. It is clear that if there is an equity one way, there is an equity the other way. It is obvious that the reason why such equity on either side has never been administered habitually by this Court is, that by attempting it, a grievous burthen would be imposed upon the estates of testators, by reason of the complex investigation which it would lead to. The gain to either party would be far more than compensated, by the expense which might be incurred in a complicated case, and for that reason, no doubt, the thing has never been done. I will not be the first to introduce the practice."

1896
BULKELEY
v.
STEPHENS.
—

In *Freman v. Whitbread* (1) the Vice-Chancellor delivered a judgment which may be said to be exhaustive. He there amplifies the reasoning of the case I have just referred to. Both those decisions were before the Apportionment Act, 1870, and it is necessary to consider the effect of that Act. Sect. 2 provides (inter alia) that dividends shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. It appears to me that the Vice-Chancellor would have come to the same conclusion if he had had to deal with similar cases after the passing of the Act; for he said at the conclusion of his judgment in *Scholefield v. Redfern* (2): "It was suggested, that though this may be so with regard to stock, the dividends of which are payable at the end of each successive half-year, a different rule is applicable to the case of railway debentures and other property of that description yielding interest *de die in diem*. If anything is received as interest, that interest will belong to the tenant for

(1) L. R. 1 Eq. 266.

(2) 2 Dr. & Sm. 183.

STIRLING J. life ; but if the debenture is sold for a given sum, that sum
1896 must be treated as capital." But the Act does not merely
BULKELEY declare that rents and dividends shall be apportionable, but
v. also provides when the apportioned parts shall be payable and
STEPHENS. how they shall be recoverable. [His Lordship then read ss. 3
and 4 of the Act, and continued :—] It was argued that the
trustee has received the dividend within the meaning of those
sections, and is consequently liable to account for a proportion
of it to the applicant. In point of fact, however, the dividend
has been received, not by the trustee, but by the purchaser, and
it is admitted that the applicant has no rights against the
purchaser. What the trustee has received is the purchase-
money of the stock sold "cum dividend." That purchase-
money was augmented, no doubt, by the dividend in prospect ;
but still the sum by which it was increased is not the actual
dividend. It seems to me, therefore, that those sections do not
apply directly, and that what I have to consider is whether the
legal personal representatives of the tenant for life are entitled to
insist on an equity of a similar nature to that which the Vice-
Chancellor declined to enforce in the cases before him. The
reasons given by the Vice-Chancellor are two—first, the absence
of any practice giving effect to the equity alleged ; secondly,
the great burden which the introduction of the practice would
cast on trust properties. The first of these reasons seems to be
applicable to the present case. No case has been cited in
which effect has been given to such a right as is here claimed.
I have inquired as to the practice in the Registrar's Office, and
have been informed that no such practice is recognised in the
ordinary course of dealing with funds directed to be sold on the
death of a tenant for life, and, further, that there is no case in
which an order has been made giving effect to the right claimed.
As to the second of the Vice-Chancellor's reasons, the burden
certainly does not appear so great as on a change of invest-
ments—first, because in the latter case the alleged right would
arise both on the sale of the original investment sold and on the
reinvestment, whereas here it affects the sale only ; and, secondly,
because changes of investment may take place often, whereas a
sale for the purpose of distribution must take place only once for

all. Still the burden is considerable. What the legal personal representatives of the tenant for life ought to receive is so much of the purchase-money as represents—in the language of the Vice-Chancellor (1)—the value of the proportionate part of the dividend. How is that value to be ascertained? It was suggested that it is to be ascertained simply by finding the dividend actually paid and treating it as subject to a discount of, say, 4 per cent. during the period between the sale and the payment of the dividend. In many cases that might work very considerable injustice. I do not see how it can be determined except by means of the evidence of stockbrokers as to the price at which the stock could have been sold at the actual time of sale *ex dividend*, the difference between this and the actual price being treated as the value of the dividend. That would, in many cases, result in a conflict of evidence, and the trustees would have to come to the Court for protection. Again, in the cases of companies, the distribution would almost always be delayed, and possibly for a long time. Looking at all these circumstances, I am not prepared to introduce any novel practice applicable to the sale of shares in the ordinary course of the execution of a trust consequent on the death of a tenant for life. It has, however, been held that, even in such cases as were dealt with by *Kindersley V.-C.*, effect may be given to the right claimed under special circumstances: see *Lord Londesborough v. Somerville* (2); *Bulkeley v. Stephens*. (3) In the present case the trust at the death of the tenant for life is thus expressed: “To pay, transfer and assign my residuary estate and the stocks, funds, and securities upon which the same shall be invested unto and amongst” a particular class of beneficiaries, who have been proved to be very numerous. That trust would be properly carried out, not by sale of the investments, but by transfer of them to the beneficiaries; and, if so carried out, it would be the duty of the trustee so to transfer that the legal personal representative of the tenant for life should be able (either directly or through the intervention of the trustee) to obtain payment of the apportioned part of the dividend to

STIRLING J.
1896
BULKELEY
v.
STEPHENS.
—

(1) 2 Dr. & Sm. 182.

(2) 19 Beav. 295.

(3) 3 N. R. 105.

STIRLING J. which the tenant for life was entitled. The order of November 12, 1894, was made, not in the execution of any trust or power for sale vested in the trustees, but in order to facilitate the division of the testator's residuary estate. I do not doubt that the order was properly made, but it was made in the absence of the legal personal representatives of Mrs. Lyne Stephens. If those legal personal representatives had been present they might have urged with success that Mrs. Lyne Stephens' estate ought not to be placed in a worse position than if the trust had been carried out in the strict and proper mode—namely, by transfer to the legatees. That being so, I think that the legal personal representatives may still assert the same right; and, under these particular circumstances, the application ought to be acceded to.

Solicitors: *Tathams & Pym; Robbins, Billing & Co.*

G. A. S.

In re CULVERHOUSE.
COOK *v.* CULVERHOUSE.

[1895 C. 3400.]

KEKEWICH
J.

1896

March 20.

Will—Estate Duty—Leaseholds—Specific Legatee—Primary Charge—General Personal Estate—Title—Executor—Assent—Assignment—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.

As leaseholds specifically bequeathed are property which by law passes to the executor as such, the estate duty upon them under the Finance Act, 1894, is payable out of the testator's general personal estate, and is not primarily charged upon them under s. 9, sub-s. 1.

The title to leaseholds specifically bequeathed vests, upon the assent of the executor, absolutely in the legatee, without any deed of assignment.

JOHN CULVERHOUSE, who died on December 18, 1894, by his will, after appointing executors, and bequeathing sundry pecuniary legacies, specifically bequeathed certain leasehold houses to various persons; and his residuary real and personal estate he gave to his executors upon trust for sale and to hold the proceeds, after payment thereof of his funeral and testamentary expenses and debts, and the legacies thereinbefore bequeathed, in trust for his two sons equally.

In 1895 this action was brought by the executors, by originating summons, for administration of his estate, and on December 18, 1895, an order was made directing various inquiries, which were still pending.

Subsequently to the commencement of the action, the executors admitted assets sufficient to meet all the specific bequests of leaseholds; and the question arose whether it was necessary that the leaseholds should be assigned to the several legatees by deed, including covenants by them to indemnify the testator's estate against the rents and covenants in the leases. The legatees contended that no deed was necessary in order to vest the leaseholds in them, and that it would be sufficient to have handed over to them, free of expense, the title-deeds of the properties together with a formal written assent of the executors.

A further question arose whether, the executors having, under

KEKEWICH the Finance Act, 1894, paid the Government estate duty on the specifically bequeathed leaseholds, the duty should be apportioned in respect of those several leaseholds, and the specific legatees contribute their due proportions; or whether the duty must be wholly borne by the general personal estate.

J.
1896
In re
CULVERHOUSE.
COOK
v.
CULVERHOUSE.
—

These questions were submitted for the opinion of the Court upon a summons taken out by the plaintiffs, the executors.

Rowden, for the plaintiffs.

Upjohn, for the specific legatees of leaseholds. We do not require any assignments at all. All we want is the assent of the executors to the several bequests, and that assent is sufficient to pass the legal title without any conveyance.

With regard to the estate duty, s. 9, sub-s. 1, of the Finance Act, 1894, says that "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable." But there is no apportionment in respect of property which does pass to the executor as such. These leaseholds passed to the executor as such, and accordingly are not primarily charged with duty under the section, and the duty must come out of the general estate.

[He was stopped by the Court.]

J. G. Wood, for pecuniary legatees. A rateable part of the estate duty should, under s. 9, sub-s. 1, of the Act, be thrown on the specific legatees. The question is whether chattels real specifically bequeathed do, on the executor assenting to the bequest, vest in the executor. I submit they do not, because, on the assent, the title relates back to the death of the testator, and so passes directly to the legatee. The effect of a bequest of a chattel real is that it vests, not from the time of the executor's assent, but from the date of the testator's death: the assent is to be treated as taking effect as from that date; the executor meaning by it that the bequest shall take effect according to the intention expressed by the testator.

[KEKEWICH J. "When a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office": *Williams on Executors*, 9th ed. p. 600.]

That passage did not intend to deal with the devolution of a legal estate. Take the case of a remainder: it takes effect by force of the will. So here, the executor, in assenting, merely says, "I do not wish to intercept the legacy." His assent is a disclaimer of his right as executor to dispose of the property.

Ribton, for infants in the same interest.

KEKEWICH
J.
1896
In re
CULVERHOUSE,
COOK
v.
CULVERHOUSE.

KEKEWICH J. I am quite sure that Mr. Wood's solution of the difficulty must have something to be said for it; but I am not prepared, without some distinct authority, to run away from elementary rules, and one of the first things I learnt in this branch of the law was what is laid down in Williams on Executors, 9th ed. p. 600, where leaseholds are said to vest in the executor by virtue of his office. Then, as to the effect of assent by the executor to a bequest of leaseholds, the law is thus stated (Id. p. 802, note (f)): "However, the general rule certainly is that, at law, the title to any specific thing bequeathed, vests, upon the assent of the executor, absolutely in the legatee, so as to enable him to bring an action of ejectment for a chattel leasehold, or trover for the goods which are the subject of the legacy." In my opinion, that is exactly Mr. Upjohn's position. He says, "These leaseholds pass to the executor as such, and therefore they do not come within s. 9 of the Finance Act, and when I get the assent of the executor they vest in me." It is an exception from the general law that a man requires, in order to complete his title, something in the nature of a conveyance. Therefore, the estate duty is payable out of the general personal estate and should not be borne by the specific legatees.

[Upon the further question, as to whether the specific legatees ought to indemnify the executors against the rents and covenants in the leases, the legatees submitted to execute an indemnity to the executors, and the costs of all parties to the indemnity were ordered to be paid out of the general personal estate.]

Solicitors: *Lövell, Son & Pitfield; Rooke & Sons; A. G. Maskell; Bartlett & Co.*
G. I. F. C.

KEKEWICH
J.

HORNSEY DISTRICT COUNCIL v. SMITH.

1896

[1896 H. 326.]

March 25. *National School—Trustees—Statutory Conveyance—Local Authority—Making up Road—Recovery of Expenses—“Owners”—“Charge”—School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 6—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 257.*

Under s. 6 of the School Sites Act, 1841, a piece of land was conveyed to trustees for ever for the purposes of the Act as a site for a national school, “and for no other purpose whatever” :—

Held, that the trustees were “owners” of the school premises within the definition in s. 4 of the Public Health Act, 1875, and as such liable, under s. 257, for the apportioned expenses incurred by the local authority for making up an adjoining road : also that, until payment, such expenses were, under the same section, a “charge” upon the premises, though, as to the mode of enforcing the charge, *quære*.

Bowditch v. Wakefield Local Board of Health (L. R. 6 Q. B. 567) and *Wright v. Ingle* (16 Q. B. D. 379) discussed.

By a conveyance dated April 28, 1847, and made under the School Sites Acts, 1841 and 1844 (4 & 5 Vict. c. 38, and 7 & 8 Vict. c. 37), in consideration of 50*l.*, a piece of land, forming part of the glebe of the rectory of Hornsey, was conveyed by the Rev. Richard Harvey, the then rector of Hornsey, with the consent of the bishop of the diocese, to the use of the Venerable John Sinclair, archdeacon of Middlesex, and his successors, archdeacons of Middlesex, and the said Richard Harvey and his successors, rectors of Hornsey, “for ever, for the purposes of the said Acts and to be applied as a site for a school for poor persons of and in the parish of Hornsey, and for the residence of the teacher or teachers of the said school, and for no other purpose whatever, such school to be always in union with the Incorporated National Society for promoting the education of the poor in the principles of the Established Church.” The conveyance was, in substance, in the statutory form contained in s. 10 of the Act of 1841. A national school was shortly afterwards erected on the said piece of land, and in 1885, by an order of the Charity Commissioners, the school, which was called Holy Innocents Infants’ National School, became attached

to the new ecclesiastical parish of Holy Innocents, Hornsey, formed out of the parish of Hornsey, the vicar of the parish of Holy Innocents being substituted for the rector of Hornsey as trustee. No rent whatever was received by the trustees for the use of the school premises. The school and site abutted on a "street" called "Holy Innocents Road," within the district of the Hornsey Local Board, and not being a highway repairable by the inhabitants at large; and on April 7, 1894, in pursuance of a resolution of the board, a notice under the Public Health Act, 1875, was served upon the Rev. Tilden Smith, vicar of the parish of Holy Innocents, and the Venerable Robinson Thornton, archdeacon of Middlesex, the trustees of the school, requiring them as "owners" of the school premises, to make up within thirty days that part of the road on which the premises abutted. The notice was not complied with, and thereupon the board executed the works, and on January 12, 1895, served the trustees with notice to pay 11*l.* 15*s.* 11*d.*, the apportioned amount of the cost, and upon their failure to pay it, the board commenced this action, by originating summons, against the trustees, as "owners" of the school premises, and also against the present rector of Hornsey and, as such, "owner" of or otherwise interested in the school premises, claiming a declaration that under s. 257 of the Public Health Act, 1875, the amount, together with interest at 5 per cent. per annum from January 12, 1895, and the costs of the action, were a charge on the school premises, and that such charge was entitled to priority over any other mortgage or charge on the premises, if any; and also that for the purpose of enforcing the plaintiffs' charge the premises might be sold and the proceeds applied in payment of the charge.

E. Beaumont, and *F. Low*, for the plaintiffs. The school site was conveyed under s. 6 of the School Sites Act, 1841 (4 & 5 Vict. c. 38) (1), and the question is whether the school

(1) Sect. 6 is, so far as is material, as follows:—

"It shall be lawful for any corporation, ecclesiastical or lay, whether sole or aggregate . . . holding land for

public, ecclesiastical, parochial, charitable, or other purposes or objects, subject to the provisions next hereinafter mentioned, to grant, convey, or enfranchise, for the purposes of this

KEKEWICH
J.
1896
HORNSEY
DISTRICT
COUNCIL
v.
SMITH.
—

KEKEWICH premises are thereby excluded from the operation of the Public Health Act, 1875 (38 & 39 Vict. c. 55). Upon that the following questions arise: first, whether the defendants, the trustees, are "owners" within the Public Health Act, and as such liable for the expenses of making up this road; and, secondly, whether, if they are, the expenses are a "charge" upon the school premises. We submit that under s. 257 of the Act, both questions should be answered in the affirmative. By the interpretation clause, s. 4, "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." By s. 150 power is given to the urban authority to give notice to the "owner" of premises abutting on the particular street to make up his part of it, or, if the notice is not complied with, to do the work themselves and recover the expense from the owner. Under s. 151 there is an exemption from any such liability on the part of the incumbent or minister of any church, chapel, "or place appropriated to public religious worship," and from any charge on any such church, chapel, or other place; but a "school" is not mentioned, and is therefore not exempt. Then s. 257, under which the present application is made, provides the mode in which the expenses incurred by the local authority may be recovered. It enacts that they may be recovered, with interest at 5 per cent. per annum from the date of the notice, "from any person who is the owner of such premises . . . and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." In *Corporation of Birmingham v. Baker* (1) it was held that the charge is upon the interest of every owner of the property according to the value of his ownership. So also it was held in *Guardians of Tendring*

Act, such quantity of land as aforesaid in any manner vested in such corporation Provided always, that no ecclesiastical corporation sole,

being below the dignity of a bishop, shall be authorized to make such grant without the consent in writing of the bishop of the diocese"

(1) 17 Ch. D. 782.

Union v. Downton (1) that "owner" includes all persons having an interest in the property. But neither of those cases dealt with the question of a national school. The only case of a school vested in trustees under the School Sites Act, 1841 (4 & 5 Vict. c. 38), is *Bowditch v. Wakefield Local Board of Health* (2), and there it was held that the trustees were "owners" within the old Public Health Act of 1848, which contains the same definition of "owner" as the Act of 1875. That case no doubt differs from the present in that the premises were conveyed to the trustees under s. 2 of the School Sites Act, which contains a reverter clause to the effect that on the property ceasing to be used for the purpose of the Act it shall revert to the estate of which it originally formed part; whereas in the present case the conveyance was under s. 6, which contains no such reverter clause. But we submit that makes no difference as regards the liability imposed by the Public Health Act, 1875, and that for this purpose the conveyance must be treated as if it had been made by an owner in fee simple under s. 2 of the School Sites Act. A mere difference in the form of conveyance cannot get rid of the obligations imposed by the Public Health Act for the benefit of the houses surrounding the school. In *Wright v. Ingle* (3) it was held that the trustees of a chapel were "owners" under the Metropolis Local Management Acts, and as such liable to contribute to the expense of paving a new street; and there Bowen L.J. (4) treated *Bowditch v. Wakefield Local Board of Health* (2) as an authority that "a man is not the less the 'owner' of premises, because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent." That applies here, for, under the provisions of their deed, the trustees cannot let the school at a rack-rent. In *re Christchurch Inclosure Act* (5) is a case very near the present, for there Stirling J. held that expenses incurred under s. 150 of the Public Health Act, 1875, were chargeable on property vested in a trustee for charitable purposes even though the property could not be let by reason of a statutory condition.

KEKEWICH
J.
1896
HORNSEY
DISTRICT
COUNCIL
v.
SMITH.
—

(1) [1891] 3 Ch. 265, 267.

(3) 16 Q. B. D. 379.

(2) L. R. 6 Q. B. 567.

(4) Ibid. 402.

(5) [1894] 3 Ch. 209.

KEKEWICH

J.

1896

HORNSEY
DISTRICT
COUNCIL
v.
SMITH.

Dibdin, for the defendants. First, I say there is no charge for these expenses upon this property ; and, secondly, if there is, there is a fetter upon the property preventing it from being sold to make the charge available. Upon the first point, *Bowditch v. Wakefield Local Board of Health* (1) is the only case near it ; but that was a case under s. 2 of the School Sites Act, 1841, which contains a reverter clause. A mortgage or charge on a site used for a school under any section except s. 6 would be perfectly good ; but s. 6, which we are now dealing with, is a peculiar section. In the case of a conveyance under that section the Legislature left out the reverter clause : so that the conveyance is a statutory conveyance, made according to the statutory form given in s. 10, and creating a parliamentary trust of a specified character which nothing but an Act of Parliament can alter. The section therefore fixes an inalienable charitable trust. That distinguishes this case from *Bowditch v. Wakefield Local Board of Health* (1) : and moreover, in that case the question was whether there was a personal remedy against the owner, not whether there was a charge on the premises. In *Wright v. Ingle* (2) the Master of the Rolls and Bowen L.J. discussed the very question your Lordship now has to decide, namely, whether charitable trustees could be regarded as "owners," and they thought not, deciding that the definition did not apply to persons holding premises which in contemplation of law never could be let at a rack-rent at all. Again, in *Great Eastern Ry. Co. v. Hackney District Board of Works* (3), Lord Watson said this : " The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed 'extra commercium,' or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862 " (the Metropolis Local Management Act, 1862) : a section corresponding to s. 257 of the Public Health Act, 1875. With regard to the *Christchurch Case* (4), the question as to a charge was scarcely

(1) L. R. 6 Q. B. 567.

(2) 16 Q. B. D. 379.

(3) 8 App. Cas. 687, 693.

(4) [1894] 3 Ch. 209.

raised, for it does not appear that the application was for a charge at all, though at the close of his judgment Stirling J. declared that the sum payable was a charge. The sole question argued, and, so far as appears, raised by the summons, was whether the trustee was liable to pay. That case really follows *Bowditch v. Wakefield Local Board of Health* (1), upon which Stirling J. apparently thinks that Bowen L.J. throws some doubt in *Wright v. Ingle* (2), for the Lord Justice, after referring to the *Wakefield Case* (1), says: "I am inclined to think that, if the incapacity to let were stamped on the premises, they never could have an 'owner' within the meaning of s. 250 of the Metropolis Local Management Act, 1855. So here, the incapacity to let is stamped on these premises, and therefore they cannot have an "owner" within the definition clause, s. 4, of the Public Health Act, 1875. Accordingly these trustees cannot be treated as "owners" of the school, so as to entitle the plaintiffs to a charge upon it under s. 257: the property is, by its nature, placed outside that section altogether.

Then upon the second point, even if a charge is possible, no sale can be effected because the property cannot be released from the trusts declared by the statutory conveyance. *Guardians of Tendring Union v. Downton* (3) marks the distinction between a case such as this and a case such as *Corporation of Birmingham v. Baker*. (4) Where there is a fetter on land sought to be charged in favour of a public body, that body must take subject to the fetter. Here there is a statutory fetter stamping the land with a disability which cannot be got rid of except by legislation. To sum up: first, this school is subject to a perpetual trust preventing any charge being created upon it; and, secondly, if such a charge is created by the Public Health Act, it is a barren charge which cannot be enforced.

Beaumont, in reply.

KEKEWICH J. I do not find myself at liberty to discuss this interesting and important question as if it were *res integra*. I have rather to pick my way between authorities which are

(1) L. R. 6 Q. B. 567.

(2) 16 Q. B. D. 379.

(3) [1891] 3 Ch. 265.

(4) 17 Ch. D. 782.

KEKEWICH not all precisely on the same lines ; but on the whole I think
 J. I am completely bound, and if the question is to be recon-
 sidered on principle on a full exposition of the Act of Parliament
 that must be done in a court of higher jurisdiction than mine.

1896
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 HORNSEY  
 DISTRICT  
 COUNCIL  
 v.  
 SMITH.  
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The first question arises under s. 4, the interpretation section of the Public Health Act of 1875, upon the definition of "owner." That section says, "'owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." Mr. Dibdin's argument is that that cannot apply to a case in which there never can be a letting at a rack rent. These premises are conveyed under the 6th section of the School Sites Act, 1841 (4 & 5 Vict. c. 38), to be used for the purpose of a school "and for no other purpose whatever": and that having been prescribed by Act of Parliament as a dedication for ever to that purpose, at any rate the dedication cannot be set aside except by another Act of Parliament: consequently the premises never can be let at a rack-rent, and the definition, it is said, does not apply to them.

Bowen L.J. in *Wright v. Ingle* (1) apparently thought that in such a case as that the definition of "owner" would not apply; at any rate, though he did not say it would not apply, he expressed doubt in such language as to shew what was the bias of his mind. He says (2): "Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an 'owner' within the meaning of s. 250, I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of s. 250." He is dealing with a different Act, and with different language to some extent; but that I think is immaterial, because I find that Blackburn J. in *Bowditch v. Wakefield Local Board of Health* (3) did consider he was dealing with a case where there could not be a letting at rack-rent. He says (4): "Now,

(1) 16 Q. B. D. 379.

(2) Ibid. 402.

(3) L. R. 6 Q. B. 567.

(4) Ibid. 570.

though these premises are and must be held as schools, and cannot be let for any purpose, yet, if they were let, the rent would come to the appellant. I think, therefore, he is 'owner' within the meaning of the definition." I do not see anything in what fell from Blackburn J.'s colleagues, Mellor and Lush JJ., that differs at all from him. Bowen L.J. in *Wright v. Ingle* (1), in a passage immediately before that which I read just now, says this: "I think *Bowditch v. Wakefield Local Board of Health* (2) is a conclusive authority, if authority were wanted, to shew that a man is not the less the 'owner' of premises, because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent." It seems to me, therefore, that, notwithstanding the strong doubt expressed by Bowen L.J., I must regard these trustees as owners; and I observe that in commenting upon Bowen L.J.'s remarks in the *Christchurch Case* (3) Stirling J. pointed out, as I have done in different language, that the Lord Justice was confirming at the time the judgment in *Bowditch v. Wakefield Local Board of Health* (2), and that, therefore, he must be taken to have made his remarks subject to that decision. It seems to me, therefore, that I am bound to hold these trustees are "owners."

If they are owners, the difficulty is cleared away very much as regards s. 257, because it is where the amount can be recovered from the owner that there is a charge. Still, that has been argued as a separate question, and must be dealt with somewhat separately. It depends upon this. Mr. Beaumont says there is an express exception by s. 151 of a "church" in the ordinary sense of the word. That is so. Therefore, he argues, you cannot have any other exception of a similar character—the express exception negatives anything else. I do not follow that. There is an express exception here; but if the Common Law or another statute applies, I see no reason why, although the Legislature has thought fit to put in that express exception, that should prevent me from holding that there is another by Common Law or by force of some other

J.  
1896  
HORNSEY  
DISTRICT  
COUNCIL  
v.  
SMITH.

(1) 16 Q. B. D. 402.

(2) L. R. 6 Q. B. 567.

(3) [1894] 3 Ch. 209.

KEKEWICH statute. No doubt in *Wright v. Ingle* (1) both Bowen L.J. and the Master of the Rolls point out that there may be a legal incapacity created by statute. To use the Lord Justice's words (2), "this legal incapacity can, I think, be also created by statute, but it is an essential ingredient of the incapacity that it should affect the nature of the property." In the present case, this is property which must be held upon the particular trusts specified: it can be held for no other purpose; and I see very great difficulty in the plaintiffs making the charge effective, because they can make no title. They cannot sell the property, as I read the School Sites Act and the conveyance, to anybody who will not use it for the particular school to which it has been dedicated; but at the same time, I do not see why, when the Public Health Act creates a charge, that charge cannot be enforced by sale. The Act certainly says that the expenses shall be a charge, and the plaintiffs may have some remedies, the precise nature of which they will have to discover, and which I do not myself exactly foresee. But the statute having said—as it has said, in my opinion, in clear terms—that when the expenses cannot be recovered from the owners then there shall be a charge, I cannot think it right to say that shall not apply to these premises simply because, by force of an Act of Parliament, they cannot be used for any other purpose than the school to which they are at present devoted. It seems to me that you can only get out of that on the ground that the trustees are not "owners" within the meaning of the statute; but, for the reasons which I have mentioned, I find myself compelled to hold that they are owners.

There will, therefore, be a declaration that the apportioned sum, with interest at 4 per cent. per annum, is a charge upon the school premises, with liberty to apply at chambers as to the mode of enforcing the charge. The costs of the plaintiffs, as being mortgagees, will be added to their security.

Solicitors: *Leonard J. Tatham; Lee, Bolton & Lee.*

(1) 16 Q. B. D. 379.

(2) 16 Q. B. D. 400.

G. I. F. C.

J.  
1896  
HORNSEY  
DISTRICT  
COUNCIL  
v.  
SMITH.



*In re* MARGETTS.

KEKEWICH  
J.

*Costs—Taxation—Common Order to Tax—Items barred by Statute of Limitations—Submission to pay what is “Due”—Solicitor and Client—Purchase of several Lots at one Time—Separate Title—Scale Charge—General Order under Solicitors’ Remuneration Act, 1881, Sched. I., Part I., Rule 8.*

1896  
March 27, 31.

Statute-barred costs are, under the common order to tax, subject to taxation, since the Statute of Limitations does not bar the debt but only the remedy; and such costs are recoverable from the client by reason of his usual submission to pay what shall appear to be “due” on the taxation. If the client desires to raise the question whether certain items are statute-barred, he should do so by applying for a special order to tax.

A solicitor acted for the purchaser of several small lots of land all purchased at the same time, though not from the same vendor, at prices varying from 100*l.* to 10*l.* The lots were comprised in one mortgage, but each had a separate and distinct title, a separate abstract for each being delivered:—

*Held*, that the solicitor was entitled, under rule 8 in Sched I., Part I., of the rules under the Solicitors’ Remuneration Act, 1881, to the minimum charge of 5*l.* or 3*l.* for each lot, and was not restricted to one charge for the business as a whole.

ON November 26, 1895, Messrs. Margetts & Son, who had acted as solicitors for the applicant, Miss Alice Matilda Margetts, delivered to her six bills of costs, the first of which was for work done between December, 1888, and October, 1889, though on the face of the bill it appeared to be for work done down to “March, 1890.”

On December 19, 1895, Miss Margetts obtained, upon the usual petition of course, the common order to tax the six bills, the petitioner, by her petition, submitting to pay what should “appear to be due” to the solicitors on the taxation.

On the taxation Miss Margetts took the objection that the first bill was statute-barred, and should therefore be disallowed. The taxing master found that the business charged for by that bill had been completed in October, 1889, but overruled the objection and taxed the bill on the ground (amongst others) that the effect of the Statute of Limitations was not to extinguish a debt, but only to prevent its recovery; that statute-barred debts were “due,” though no action could be brought to

KEKEWICH enforce payment of them ; and that Miss Margetts had submitted to pay what should be found " due " on taxation.

J.  
1896

*In re*  
MARGETTS.

Another objection was with respect to one of the other bills. That bill amounted on taxation to 45*l.* 13*s.* 9*d.*, and was for charges and disbursements in relation to the purchase by Miss Margetts of four properties of which the purchase prices were respectively 105*l.*, 100*l.*, 10*l.*, and 50*l.*, and which purchases Miss Margetts contended were, practically, one transaction, all the properties having been comprised in one mortgage, though they were not all purchased from the same vendor. The taxing master overruled this objection also, holding that the solicitors were entitled to charge for each lot the minimum charge of 5*l.* or 3*l.*, as provided for by rule 8 in Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, on the ground that each lot had a separate and distinct title ; that separate abstracts had been delivered for each lot ; and that each title had required separate investigation.

Rule 8 provides that " where the prescribed remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor or mortgagee, is to be 3*l.*"

This was a summons by Miss Margetts to review the taxation.

*Ashton Cross*, for the applicant. The first question is whether under the common order to tax a solicitor's bill of costs statute-barred items ought to be excluded. The whole of the work in this case was completed by October, 1889, and the whole of the items are accordingly barred by the Statute of Limitations. The taxing master has relied on *Budgett v. Budgett* (1), *Green v. Humphreys* (2), and *Curwen v. Milburn* (3), as shewing that, because the petition of course for the common order to tax contains a submission by the client to pay what is " due," and the Statute of Limitations does not bar the debt but only the remedy, these statute-barred items ought to be included in the taxation, and that the client is liable to pay

(1) [1895] 1 Ch. 202.

(2) 26 Ch. D. 474.

(3) 42 Ch. D. 424.

them. I ask your Lordship to say that no such point was decided in those cases, and that there is no such liability. In *Budgett v. Budgett* (1) the only question was as to the right of trustees to indemnity against costs, and it was said (2) that statute-barred items would remain, as theretofore, untaxable under the common order. In *Curwen v. Milburn* (3) the party liable was, to some extent, in the position of a plaintiff, as he had chosen to ask for a bill of costs. Here the applicant is simply in the position of a defendant; and I submit that the statute-barred items ought not to be included, and that even if, as a matter of convenience, they are included, the taxing master has no power to hold, as in effect he has done, the applicant liable to pay them.

KEKEWICH  
J.  
1896  
In re  
MARGETTS.  
—

*T. L. Wilkinson*, for the solicitors, was not called upon.

His Lordship then adjourned the further hearing of the summons, in order that he might consult the taxing master upon the above point.

March 31. KEKEWICH J. On such questions as this it is the practice of the judges of the Chancery Division to refer to the taxing master to ascertain whether there is any settled practice in the Taxing Office in relation thereto; and since the case was before me the other day I have done so, and found there is no settled practice; it therefore becomes important to consider what the taxing masters ought to do in such cases.

In *Curwen v. Milburn* (3) it was held that the taxing master was right in taxing all the items of the bill without regard to the Statute of Limitations, because the object was to ascertain the amount for which a lien was claimed, and that might or might not be connected with the limitation of the statute. In *Budgett v. Budgett* (1) I held that the taxing master had rightly taxed statute-barred costs which the retiring trustees of a settlement claimed the right to retain out of the trust estate, the question there being in respect of what costs the trustees were entitled to be indemnified. These two cases

(1) [1895] 1 Ch. 202.

(2) [1895] 1 Ch. 214.

(3) 42 Ch. D. 424.

KEKEWICH seem to me to go a long way towards deciding that the view  
J. the taxing master has taken here is correct.

1896

*In re*  
MARGETTS.

The point I am now dealing with is whether the taxing master ought to tax costs which are apparently statute-barred, occurring in a bill properly sent to him for taxation, and I think convenience points to taxation. Whether they ought to be paid or not when taxed is necessarily a question for the Court to determine. It seems to me far more convenient for the taxing master to deal with the items and to say what ought to be allowed for the business done, irrespective of the right to recover them, than for him to consider the question whether anything is to be recovered at all. It is really a question of convenience. If the practice of the office had been determined I should not have ventured to differ from it; but, there being no settled practice, I think the right course here is to tax the items.

Then the question is whether these particular costs are to be paid. I am dealing here with the common order to tax with the usual submission in the petition to pay what shall be found to be due, and then a direction to the taxing master to tax these bills—there having been several of them—and that is all. There are no special directions as to the taxation, no question of retainer, no other addition such as might be put into a special order.

What is the right of the petitioner, the client, as between himself and the solicitor, under such an order as this? It seems to me that, taking it simply in that view, the client ought to pay all costs properly incurred. There is no injustice in that; for he will have known beforehand what business was done: he has the bills; he instructed the solicitor; he applies for and obtains the order with his eyes open, and submits to pay what is due. Under the Statute of Limitations the debt remains due, and for many purposes is described as a debt; the statute does not bar the debt, but the remedy; and it seems to me that the more convenient construction of the order is that what is found on taxation to have been properly incurred by way of costs is intended to be paid, without regard to any objection of this kind. I have before me the objections



raised before the taxing master and his replies ; and I think it right therefore to notice briefly the reasons given by the taxing master. [His Lordship then considered some of the reasons given by the taxing master for taxing the statute-barred items, and continued :—] I would rather not ground my judgment upon them, but simply on this—that the client submitted to pay what should be found due on taxation ; and that if she wished to raise the question of the Statute of Limitations she ought to have done so by applying for a special order. I think, therefore, that I must refuse this part of the application. Now as to the next point.

KEKEWICH  
J.  
1896  
*In re*  
MARGETTS.  
—

*Ashton Cross*, for the applicant. The second question is whether, on the sale of a property in several small lots, the solicitor is entitled to the minimum charge in respect of each lot or must lump them altogether. I submit that the minimum remuneration mentioned in rule 8 in Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, is not to be applied to each individual lot but to the whole business done by the solicitor.

*T. L. Wilkinson*, for the respondents, was not called on.

KEKEWICH J. If the solicitor had been instructed to investigate the title and complete these purchases at separate intervals, so that each was completed before the other, Mr. Cross's argument would be untenable, the transactions being separate transactions in the strict sense of the term.

It happens that there were several purchases made substantially at the same time, and therefore it is said that the solicitor should be remunerated for the whole business and not for each lot.

Where there is one vendor of several properties, and the same solicitor acts for the vendor in all, so that the purchaser's solicitor has less trouble, and the work of the purchaser's solicitor is largely reduced, such a proposition would not be unreasonable.

But the rules must be applied generally, and fine distinctions cannot be drawn. It seems to me that where, as in this case,

KEKEWICH each lot has a separate and distinct title, a separate abstract, and each title is investigated, the solicitor is entitled to the minimum scale fee in each case.

J.  
1896  
~~~~~  
In re
MARGETTS.

The summons must be refused with costs.

Solicitors: *Patersons, Snow, Bloxam & Kinder, for C. B. Margetts, Huntingdon; H. Reid, for Margetts & Son, Chatteris.*

G. I. F. C.

KEKEWICH YOUNG *v.* SOUTH AFRICAN AND AUSTRALIAN EXPLORATION AND DEVELOPMENT SYNDICATE.

J.
1896
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*May 8.*

[1896 Y. 295.]

*Company—General Meeting—Special Resolution—Voting—Show of Hands—Declaration by Chairman—“Conclusive Evidence”—Shareholder—Action disputing Declaration—Notice of Special General Meeting—“General Nature” of Business—Sufficiency of Notice—“Member”—“Member entitled to Vote”—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51, Table A, Arts. 35, 37, 42.*

The declaration of the chairman at a special general meeting of shareholders under s. 51 of the Companies Act, 1862, that the special resolution has, on a show of hands, been carried, is not “conclusive evidence” of the fact so as to preclude a shareholder from disputing the validity of the resolution by legal proceedings on the ground, for instance, that it has not been carried by the statutory majority.

Although a notice under s. 51 of the Companies Act, 1862, of a special general meeting of a company regulated by Table A sufficiently complies with art. 35 if it states the “general nature” of the business, it is nevertheless desirable, where the business is of great importance, such as the proposed substitution of new articles of association for Table A, to supplement the notice with an explanatory circular.

*Quære*, whether, in the case of a company regulated by Table A to the Companies Act, 1862, any distinction is to be drawn between “members” who may constitute a quorum under art. 37, and “members entitled to vote” under s. 51 of the Act.

THE defendants, the South African and Australian Exploration and Development Syndicate, Limited, were registered under the Companies Acts, 1862 to 1890, on September 7, 1895, with a capital of 10,000*l.* in 5000 ordinary shares of 1*l.* each and 5000 preference shares of 1*l.* each. The company, being

registered without articles of association, was regulated by **KEKEWICH J.** Table A to the Companies Act, 1862.

Art. 35 of Table A provides that the notice of a general meeting shall state, "in case of special business, the general nature of such business."

Art. 37 fixes the "quorum of members" at any general meeting.

Art. 42 is as follows: "At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution."

Shortly after the incorporation of the company, John Weston, James Esdaile Venning and William Noel Middleton, promoters of the company, were appointed by the subscribers to the memorandum of association the first directors, and their appointment was confirmed at the first ordinary general meeting of the company on January 4, 1896. Middleton, though a director of the company, was not entered on the register of members.

On March 12, 1896, the company issued a notice convening an extraordinary general meeting at the office of the company for April 9, 1896, to approve new regulations, a print of which it was stated would be submitted to the meeting, and to pass the following resolution:—

"That the regulations contained in Table A be rescinded, and that the regulations contained in the printed document submitted to this meeting, and for the purpose of identification subscribed by the chairman thereof, with the modifications already approved by this meeting, and initialled by the chairman, be and the same are hereby approved, and that such regulations be and they are hereby adopted as the regulations of the company to the exclusion of the regulations hereby rescinded." The circular went on to state that all members of the company were at liberty to inspect a copy of the proposed regulations at the office of the company's solicitors, whose names and address were given.

1896  
YOUNG  
v.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

KEKEWICH  
J.  
1896  
~  
YOUNG  
v.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

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The meeting was held at the company's office on April 9, 1896, all three directors being present, and one of them, J. E. Venning, being in the chair. The chairman stated the object of the meeting, holding a copy of the proposed regulations in his hand, but no copy was handed to any of the shareholders present, nor were any of the regulations read out to the meeting. After the chairman's introductory speech some discussion took place, in the course of which an amendment was proposed and carried altering a clause in the new regulations as to the voting power of shareholders. The resolution was then put to the meeting by the chairman, and, upon a show of hands, was declared by him to be carried, no poll being demanded. This declaration was duly recorded on the minutes. It was also agreed by the meeting that a print of the proposed regulations should be sent to each member with the notice convening the confirmatory meeting.

On April 23, 1896, the company issued a circular to the shareholders convening an extraordinary general meeting for May 5 to confirm the resolution, the circular being accompanied with a print of the new regulations. It was then discovered that it was proposed by art. 87 of the new regulations that the directors should be paid out of the funds of the company, by way of remuneration for their services in each year, a sum equal to 20 per cent. of the net profits for that year, such remuneration to be divided among them in such proportions and manner as they should determine, and, in default, equally; and that the clause should be deemed to take effect as from the date of the appointment of the first directors. It was objected that by this article the directors would be able to remunerate themselves for past services out of the assets of the company, in spite of the fact that the attention of the shareholders had never been called to such alteration by the directors; and it was also objected that the directors would be thereby entitled to an undue share of the large profits made by the company during the previous year. It was also objected that others of the new articles would have the effect of continuing the present directors in office for two years longer. Some of the shareholders complained that these and other points arising on the



new articles had not been called to the attention of the general body of shareholders either at the meeting of April 9 or previously; and two of the shareholders then commenced this action against the company and the three directors, and now moved by special leave for an injunction, to restrain the defendants from holding the confirmatory meeting, or, in the alternative, for an interim injunction to restrain them from acting on the resolution of April 9.

The plaintiffs contended that the resolution had been passed irregularly, on the grounds that no sufficient notice of the contents of the new articles had been previously given to the shareholders; that there was not a sufficient quorum of shareholders present at the meeting; and that the resolution was not passed by a three-fourths majority of the shareholders, as required by s. 51 (1) of the Companies Act, 1862.

From the evidence it appeared that there were twelve shareholders present at the meeting of April 9, 1896, of whom, on the show of hands, nine, including Middleton, were in favour of the resolution and three against; so that if Middleton were excluded, as it was contended he ought to have been, not being a member on the register, only eight would have been in favour of the resolution, that is to say, less than the statutory three-fourths majority.

(1) The material part of s. 51 of the Companies Act, 1862, is as follows: "A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been duly confirmed by a majority of such members for the time

being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same."

KEKEWICH  
J.  
1896  
YOUNG  
P.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

KEKEWICH  
J.  
1896  
YOUNG  
v.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

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*Warrington, Q.C.*, and *Lavington*, for the plaintiffs. In the first place, under art. 35 of Table A to the Companies Act, 1862, sufficient notice was not given of the proposed new regulations. Their "general nature" should have been specified; and particular attention should have been called to the important regulation by which the directors might remunerate themselves for their past as well as future services, and also to the regulation as to continuing the present directors in office. In the next place, it is clear that Middleton, one of the majority of nine, was not entitled to vote, and therefore there was not the statutory majority of three-fourths required by s. 51 to pass the resolution.

*Renshaw, Q.C.*, and *T. L. Wilkinson*, for the defendants. As to the notice, it is a sufficient compliance with art. 35 of Table A, for it did state, as required, the "general nature" of the business, followed by an intimation that a copy of the proposed regulations could be inspected at the office of the company's solicitors. This was in strict accordance with the practice as laid down in Palmer's Company Precedents, 5th ed. p. 366; 6th ed. vol. i. p. 528. Then as to the question of the three-fourths majority. Middleton was entitled, under art. 37 of Table A, to form one of a quorum as being a "member." No doubt, s. 51 of the Act says the majority must be "members entitled to vote"; but to make art. 37 consistent with s. 51 "member" should be read as "member entitled to vote," for it seems absurd to say that any member of a quorum can be excluded from voting. At any rate, the motion is idle, for it is perfectly clear that the resolution, if a fresh meeting is called, can be carried by a large majority. But what we mainly rely upon is the formal declaration of the chairman that the resolution was carried, and the entry of this declaration on the minutes. Under s. 51, this declaration is to be "deemed conclusive evidence of the fact" without proof of the number of votes for or against the resolution. There is no clear authority to be found in the books as to the precise effect in law of such a declaration. It is stated in Buckley on the Companies Acts, 6th ed. p. 186, that "the declaration of the chairman is by this section (51) made 'conclusive evidence' that the resolution has been carried," referring to the note of a

case before Hall V.-C.; but then the learned author goes on to say, "Of course if the chairman's ruling is challenged by legal proceedings it is not conclusive." The latter statement, however, is not borne out by the authorities cited. For instance, *Harben v. Phillips* (1), was not a case on s. 51 at all, there not being a single reference to it. So *Pender v. Lushington* (2) turned on special articles. Also *In re Horbury Bridge Coal, Iron and Waggon Co.* (3) was a case under an article and not under the section. The only reported case as to what is "conclusive evidence" within the meaning of the Act is *In re National Debenture and Assets Corporation* (4), where it was held that the certificate of incorporation of a company was not "conclusive evidence" that the requirements as to registration had been complied with if it could be proved that there were not seven subscribers to the memorandum of association. That, however, was a case under s. 18, not under s. 51. No doubt, there is a difference in the language of ss. 18 and 51, s. 18 saying "shall be conclusive evidence," while s. 51 says only "shall be deemed conclusive evidence"; but the first part of the note in Buckley seems to point to a reasonable conclusion as to the meaning of s. 51.

*Warrington, Q.C.*, was called on to reply only upon the point as to the effect of the chairman's declaration. Sect. 51 could never have been intended to preclude a shareholder from questioning the legality of the chairman's declaration, or to prevent him from proving by legal proceedings that the declaration was contrary to the real facts: otherwise a door would be opened to fraud. The latter part of the statement in Buckley, though not strictly borne out by the authorities cited, represents what is at all events a reasonable conclusion upon the section; and I submit there is nothing to preclude a shareholder from shewing, if he can, that a resolution has not been properly carried.

KEKEWICH J. The answer made to Mr. Warrington's main point is that the declaration of the chairman is not only sufficient,

KEKEWICH  
J.  
1896  
YOUNG  
v.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

(1) 23 Ch. D. 14. (3) 11 Ch. D. 109.  
(2) 6 Ch. D. 70. (4) [1891] 2 Ch. 505.

KEKEWICH but, according to the statute conclusive evidence; and that, therefore, I am not at liberty to consider whether, as a matter of fact, the requisite proportion of votes in favour of the resolution was given.

J.  
1896  
YOUNG  
v.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

It is somewhat strange that this point should arise now for the first time; and it is still more strange that it should arise in this way—and for this reason. This was a company regulated by Table A; that is to say, a company registered without articles of association, and therefore having the regulations in Table A for its articles of association. If any question, therefore, arises with regard to the result of the general meeting, you must look to Table A. And Table A, art. 42, says this: [His Lordship read the article, and continued:—]

There you have a distinction suggested between “sufficient evidence” and “conclusive evidence,” as was pointed out by Sir George Jessel in the *Horbury Bridge Case* (1), with the consequence which follows from that distinction.

But, besides Table A, the statute itself also applies to the company; and the statute provides that, whether the company is governed by Table A, or by what are called contractual articles of association, those regulations, whatever they are, may be altered by special resolution under s. 51; and then, though it is not provided for by Table A, “a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same.” The section says “conclusive,” not “sufficient”; and I am not aware of any case which has explained the meaning of the word. Mr. Buckley calls attention in his book (6th ed. p. 186) to a case of *In re Brynmawr Coal and Iron Co.* (2), in which it was decided by Hall V.-C. that a declaration by the chairman was sufficient to justify a supervision order, as an affidavit shewing that there had been a statutory majority in favour of the voluntary resolution to wind up could not be produced. That goes some length, no doubt, as shewing that the declaration is of great value as evidence, but it does not say how far it must be treated as “conclusive evidence.” There is

(1) 11 Ch. D. 114.

(2) W. N. (1877) 45.



no doubt it cannot be accepted as conclusive evidence for the purpose of establishing a contract if it is challenged; and it would be an extremely strong thing to hold that any form of words should enable a chairman fraudulently—though it is not suggested that there was anything fraudulent here—to declare a resolution carried, make the proper entries, and then treat that as conclusive evidence. I think the section cannot mean that, and its wording helps me to that conclusion. In the first place the declaration is to “be deemed conclusive evidence.” That is something different, I suppose, from being actually “conclusive evidence”; and then it is to be deemed conclusive evidence “without proof of the number or proportion of the votes recorded in favour of or against the same.”

The reasonable construction of that clause seems to me to be that you are not bound to prove either the number or proportion of the votes, but that, without more, the declaration of the chairman is to be accepted as conclusive evidence without that proof; not that it shall be accepted as conclusive if there is proof that the number or proportion of votes is against the declaration. If there is proof forthcoming that the declaration is inconsistent with the real facts, I do not think that the word “conclusive” goes so far as to exclude that evidence; for otherwise it would open the door to gross mistake if not to fraud.

Sect. 18 of the Act provides that the certificate of incorporation “shall be conclusive evidence” that the requisitions of the Act as to registration have been complied with. That clause has received a good deal of interpretation, beginning with *In re Northumberland and Durham District Banking Co.* (1) There the words are slightly different from those in s. 51, for they are “shall be conclusive,” not “shall be deemed conclusive.” Without referring to the last case on the point, *In re National Debenture and Assets Corporation* (2), which was before myself, I think all the cases shew that the Court considers itself at liberty and indeed bound to go into a matter of this kind; that is to say, to allow parties to dispute the declaration notwithstanding that provision as to “conclusive evidence”; in other

(1) 2 De G. &amp; J. 357.

(2) [1891] 2 Ch. 505.

KEKEWICH  
J.  
1896  
YOUNG  
v.  
SOUTH  
AFRICAN  
AND  
AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

KEKEWICH J. words, to leave the real question open to be decided by legal proceedings.

1896

YOUNG

v.

SOUTH  
AFRICAN  
AND

AUSTRALIAN  
EXPLORATION  
AND  
DEVELOPMENT  
SYNDICATE.

Therefore, for the present purpose it is enough for me to say that the declaration of the chairman is not sufficient evidence to exclude me from considering whether, as a matter of fact, the provisions of the Act have been complied with.

I do not propose to go into all the history of the case, but there is one important matter I ought to mention and as to which I am, as at present advised, not in favour of the plaintiffs.

This meeting was a most important one. It was a meeting to entirely alter the regulations of the company, to take away the common form of Table A, and to substitute therefor what I will call "contractual regulations." Therefore, it was of the first importance that all the members should know under what regulations they were now coming; and it was desirable they should be told in the fullest possible way what was proposed; and I cannot help thinking it would have been far better if an explanatory circular had been issued to the members giving them the opportunity of considering whether they objected or not. At the same time I cannot hold, as at present advised, that the notice which was given was insufficient. There was a notice of a special general meeting, and there was thereby given, in general terms, notice of the character of the business to be submitted to it. That seems to be sufficient within art. 35 of Table A; and besides that, it was apparent on the face of the notice that the intention was to substitute new regulations, and the members of the company were told that they were at liberty to inspect a copy of the proposed regulations at the office of the solicitors of the company, whose address was given.

Now it is common knowledge that members of a company do not usually attend either ordinary or special meetings: they take no particular interest in them; and, as long as they have any confidence in the executive at all, they leave the management in the hands of the executive, and are quite prepared to support any reasonable proposal which the executive may make. So that often it would really be a waste of time and incurring useless expense to send to each shareholder a copy for himself

of proposed new regulations or to read them through at a meeting. Perhaps it is not assuming too much to say that, as to some of the shareholders in this company, if they had read the proposed new regulations they would not have understood them or have discovered that they altered the remuneration of directors, or to what they pointed. I am satisfied myself that practically no real good would have been gained by sending the members notice of every one of the new regulations in that way. I think they had sufficient notice in a general way to bind them; and that is borne out by what happened at the meeting, for it is clear on the evidence that some of the members who attended had looked at the regulations. Questions were asked about them, and one amendment at all events with regard to the voting power was proposed and carried, and the proposed regulations were altered accordingly.

I think, therefore, that sufficient notice was given to satisfy the law, though it would have been better to have given the shareholders a short explanatory statement of what was proposed.

Then comes the question of the three-fourths majority which was necessary in order to pass the resolution. One need not go through all the figures, because it is conceded that, in order to get the three-fourths majority, there must have been nine who voted against the three dissentients. I say nothing here about the distinction between "members" and "members entitled to vote." The distinction is certainly to be found on the face of the Act, and it may be, though I do not pause to consider it further, that members who are not entitled to vote may be members who are entitled to form a quorum. That seems a practical absurdity, but I pass it by for the present purpose.

There was not the necessary majority of nine supporters of the resolution unless Mr. Middleton is counted as being present and entitled to vote. It is not denied that, though he may have been entitled to be there as a director, he could not properly vote. The result is that the majority is reduced to eight, and, as eight do not constitute the necessary three-fourths majority, it does not appear to me that the special resolution has been properly passed.

KEKEWICH

J.

1896

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YOUNG

v.

SOUTH

AFRICAN

AND

AUSTRALIAN

EXPLORATION

AND

DEVELOPMENT

SYNDICATE.

—

Mr. Renshaw has said it is a useless proceeding to go through all this again, because there is no doubt what the majority will do. However that may be, that is the right of a minority ; and experience tells us that sometimes, when minorities insist on their rights, they ultimately prevail.

There must, therefore, be an injunction to restrain the defendants from acting on the resolution.

Solicitors: *T. M. Richards ; Venning, Sons & Co.*

G. I. F. C.

In re KINGSTON COTTON MILL COMPANY (No. 2).

[0098 of 1894.]

C. A.

1896

May 6, 7, 8,
19.

*Company—Winding-up—Auditors—Duties as to Stock-taking—Misfeasance—
Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10.*

Held (affirming the judgment of Vaughan Williams J.), that where an officer of a company has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible in an action, such breach of duty is a “misfeasance” for which he may be summarily proceeded against under the Companies (Winding-up) Act, 1890, s. 10, and it is not necessary that an action should be brought.

For some years before a company was wound up, balance-sheets signed by the auditors were published by the directors to the shareholders in which the value of the company’s stock-in-trade at the end of each year was grossly overstated. The auditors relied on certificates, wilfully false, given by J., one of the directors who was also manager, as to the value of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its true value it would have appeared that there were no profits out of which a dividend could be declared. If the auditors had compared the different books and added to the stock-in-trade at the beginning of the year the amounts purchased during the year, and deducted the amounts sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so:—

Held (reversing the decision of Vaughan Williams J.), that, it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion, and that they were not liable for the dividends wrongfully paid.

An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care and skill.

THIS was an appeal from a decision of Vaughan Williams J. (1), in the report of which the facts will be found fully stated.

For some years before the company was ordered to be wound up, balance-sheets signed by the auditors were published by the directors to the shareholders, in which to an increasing extent

C. A.

1896

In reKINGSTON
COTTON MILL
COMPANY
(No. 2).

in each year the value of the stock-in-trade at the end of the year was grossly overstated. Dividends were declared and paid for several years on the footing that these balance-sheets were correct, whereas, if the true values of the stock-in-trade had been given, it would have appeared that there were no profits. The auditors relied on the certificates of the manager, who was also a director, as to the value of the stock-in-trade, and in each case the amount was entered in the balance-sheet "As per manager's certificate." If the auditors had added to the alleged value of the stock-in-trade at the beginning of any of these years the amount spent in purchasing raw materials during the year, and had deducted the amount of the year's sales, it would have been seen that the statement of the value of the stock-in-trade at the end of the year required explanation; but they did not enter into any such inquiry. The manager was a man of great business ability and of high repute, and up to the stoppage of the company was trusted by every one; but he had designedly exaggerated the value of the stock-in-trade in order to make the company appear prosperous. Vaughan Williams J. held that it was the duty of the auditors to test the accuracy of the manager's certificate by a comparison of the figures in the books, and that they were liable for the dividends which had been paid in consequence of the erroneous balance-sheets. The auditors appealed.

Haldane, Q.C., Swinfen Eady, Q.C., and T. H. Watson, for the appellants. It was not the duty of the auditors to enter into such a comparison of the books as suggested by Vaughan Williams J. unless there was something to arouse suspicion; but there was nothing, for it is clear that the increase in the value of the stock-in-trade did not awaken the suspicions of any one concerned in the company. Mere error of judgment on the part of an auditor is not enough: *Purves v. Landell*. (1) Under s. 10 of the Act of 1890, in order to render an officer of a company liable in a case where there has been no misapplication or retainer of moneys or property of the company, or accountability in respect thereof, there must be misfeasance in the

(1) 12 Cl. & F. 91.

nature of a breach of trust: *In re Forest of Dean Coal Mining Co.* (1); *Coventry and Dixon's Case* (2); *Re Wedgwood Coal and Iron Co.* (3); *Bentinck v. Fenn.* (4) Here there has been no misfeasance or breach of trust, and, if anything can be charged against the auditors, it is mere negligence of such a character that no action at common law could have been founded upon it: *In re London and General Bank.* (5) It is said that the auditors ought to have discovered these frauds; but, however strict an audit they had held, it could not have brought such transactions to light. Suppose securities are produced to an auditor on the face of which 50,000*l.* has been secured, and 40,000*l.* purports to have been paid off, leaving 10,000*l.* due, is the auditor bound to communicate with the mortgagees, and to ask them whether it is the fact that only 10,000*l.* is due? In this case there was nothing to arouse any suspicion on the part of the auditors, and they were both entitled and bound to accept the certificate of the manager.

[They also referred to the Rules of April, 1892, r. 27; Buckley on the Companies Acts, 6th ed. p. 620.]

Cozens-Hardy, Q.C. (with him, *Rawlins, Q.C.*), for the respondent, the official receiver and liquidator. This case comes entirely within the wording of the section, and is governed by the decision in *In re London and General Bank* (5), which is directly in point in this case. The question what are the duties of an auditor in reference to stock-taking is one of universal importance, and those duties were not rightfully discharged by the auditors in this case. There was quite enough upon the face of the accounts to put them on inquiries, which, if made, would have disclosed the extent to which the stock had been overvalued, and their omission to make these inquiries was negligence amounting to misfeasance. They were put there for the purpose of making inquiries. They were not bound to go outside the books of the company except by making inquiries of the officials of the company; but they took the manager's estimates without comparing them with the

C. A.

1896

In re
KINGSTON
COTTON MILL
COMPANY
(No. 2).

(1) 10 Ch. D. 450.

(3) 47 L. T. (N.S.) 612.

(2) 14 Ch. D. 660.

(4) 12 App. Cas. 652, 669.

(5) [1895] 2 Ch. 673.

C. A.
 1896
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*In re*  
 KINGSTON  
 COTTON MILL  
 COMPANY  
 (No. 2).  
 ———

books. The appellants must stand or fall by the proposition that they were entitled to rely on the certificate of the managing director, though an examination of the books before them would have led to inquiry. If that be so, an auditor is of no use. The books shew that there was barely half the amount of the stock-in-trade that was certified. The auditors ought not to rely on the certificate of the managing director as implicitly as on that of an independent expert, and the increase of the value of the stock by bounds from year to year was a thing to excite suspicion. In *Leeds Estate Building and Investment Co. v. Shepherd* (1) an auditor was held liable under very similar circumstances.

*Haldane, Q.C.*, in reply. In the case last cited the auditor had altogether failed in his duty. Proper accounts had not been presented to the directors, and the auditor had certified without investigation the accounts which the managing director put before him. Mr. Cozens-Hardy says an auditor is bound to be suspicious; but this is not so: he is bound to take nothing for granted; but he is not bound to suspect fraud unless there is something to arouse suspicion; and here the evidence shews that up to the stoppage of the company no one at all suspected the accuracy of the certificates. The duties of auditors are defined in *In re London and General Bank* (2), and it is there laid down that all they are bound to do is to exercise reasonable care and skill. In *Bentinck v. Fenn* (3) Lord Macnaghten says it is settled that "misfeasance" means misfeasance in the nature of a breach of trust by which the company sustains loss. There was here no misfeasance, but only non-feasance, and an action is the proper remedy.

*Cur. adv. vult.*

May 19. LINDLEY L.J. This is an appeal from an order made by Vaughan Williams J. under s. 10 of the Companies (Winding-up) Act, 1890, on Mr. Pickering and Mr. Peasegood, the auditors of the company, ordering them to pay to the liquidator certain sums of money, being the amounts of divi-

(1) 36 Ch. D. 787.

(2) [1895] 2 Ch. 673, 682-3.

(3) 12 App. Cas. 652, 669.



dends improperly declared and paid out of the assets of the company on the faith of certain balance-sheets prepared and signed by the auditors. The facts are not in dispute. They will be found correctly stated in the report of the case. (1) The appeal is based on two grounds, namely—(1.) that the auditors have not failed to discharge their duty to the company, and are under no liability to make good the money misapplied; (2.) that, even if they have, the proper remedy is by action, and not by the summary process to which the liquidator has had recourse.

It will be convenient to dispose of the second point first. It has already been decided that the auditors of this company are “officers” within the meaning of s. 10 of the Companies (Winding-up) Act, 1890. (2) The object of that section is the same as that of s. 165 of the Companies Act, 1862, which it has replaced. That object was to facilitate the recovery by the liquidator of assets of a company improperly dealt with by its promoters, directors, or other officers. The section applies to breaches of trust and to misfeasances by such persons. I agree that the section does not apply to all cases in which actions will lie by the company for the recovery of damages against the persons named; it is easy to imagine cases of breach of contract, trespasses, negligences, or other wrongs to which the section is inapplicable, and some such have been the subject of judicial decision; but I am not aware of any authority to the effect that the section does not apply to the case of an officer who has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible by an action at law or in equity. Such a breach of duty, if established, is a “misfeasance” within the meaning of the section, or, to adopt the language used in *Bentinck v. Fenn* (3), such a breach of duty is a misfeasance in the nature of a breach of trust. This view of the section was adopted by this Court in *In re London and General Bank* (4), and is, in my opinion, correct. On this preliminary point, therefore, which, however, does not

C. A.  
1896  

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In re  
KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).  

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Lindley L.J.  

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(1) [1896] 1 Ch. 331.

(2) See [1896] 1 Ch. 6.

(3) 12 App. Cas. 652.

(4) [1895] 2 Ch. 166, 673.

C. A.

1896

In re

KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lindley L.J.

touch the merits of the case, the appellants are not entitled to succeed.

I come now to the real question in this controversy, and that is, whether the appellants have been guilty of any breach of duty to the company. To decide this question it is necessary to consider—(1.) what their duty was; (2.) how they performed it, and in what respects (if any) they failed to perform it. The duty of an auditor generally was very carefully considered by this Court in *In re London and General Bank* (1), and I cannot usefully add anything to what will be found there. (2) It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance-sheet shewing the true financial position of the company at the time to which the balance-sheet refers. But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill. It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious—as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error.

The company's articles of association contain special regulations relating to auditors: see arts. 129–140; but they do not impose upon the auditors any more onerous duties than those I have already mentioned. Auditors are, however, in my opinion bound to see what exceptional duties, if any, are cast upon them by the articles of the company whose accounts they are called upon to audit. Ignorance of the articles and of exceptional duties imposed by them would not afford any legal justification for not observing them. Some reliance was placed in this case on arts. 123 and 124. Those, however, relate to

(1) [1895] 2 Ch. 673.

(2) [1895] 2 Ch. 682–84.

the duties of the directors, and not of the auditors. Art. 124 empowers the auditors to direct what accounts shall be kept and how they shall be kept; but there is nothing in this article which makes an auditor responsible for not ordering an account to be kept which he did not think necessary. His duty in this respect is governed by the general principles which have been already stated. If on those principles it can be truly said that an auditor ought to have required a particular account to be kept, then art. 124 prevents him from effectually urging as a defence that he had no authority to require it. But beyond that, art. 124 cannot be invoked against the auditor.

I pass now to consider the complaint made against the auditors in this particular case. The complaint is that they failed to detect certain frauds. There is no charge of dishonesty on the part of the auditors: They did not certify or pass anything which they did not honestly believe to be true. It is said, however, that they were culpably careless. The circumstances are as follows: For several years frauds were committed by the manager, who, in order to bolster up the company and to make it appear flourishing when it was the reverse, deliberately exaggerated both the quantities and values of the cotton and yarn in the company's mills. He did this at the ends of the years 1890, 1891, 1892, and 1893. There was no book or account (except the stock journal to which I will refer presently) shewing the quantity or value of the cotton or yarn in the mill at any one time. It would not be easy to keep such a book. Nor is it wanted for ordinary purposes. There is considerable waste (20 or 25 per cent. on the average) in the manufacture of yarn from cotton, and the market prices of both cotton and yarn are subject to great fluctuations. The balance-sheets of each year contained on the asset side entries of the values of the stock-in-trade at the end of the year, and those entries were stated to be "As per manager's certificate." There were also in the balance-sheets entries on the opposite side of the values of the stock-in-trade at the beginning of the year. The quantities did not appear in either case. The auditors took the entry of the stock-in-trade at the beginning of the year from the last preceding balance-sheet, and they took the

C. A.

1896

*In re*

KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lindley L.J.  
—

C. A.

1896

*In re*KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lindley L.J.

values of the stock-in-trade at the end of the year from the stock journal. This book contained a series of accounts under various heads purporting to shew the quantities and values of the company's stock-in-trade at the end of each year, and a summary of all the accounts shewing the total value of such stock-in-trade. The summary was signed by the manager, and the value as shewn by it was adopted by the auditors and was inserted as an asset in the balance-sheet, but "As per manager's certificate." The summary always corresponded with the accounts summarized, and the auditors ascertained that this was the case. But they did not examine further into the accuracy of the accounts summarized. The auditors did not profess to guarantee the correctness of this item. They assumed no responsibility for it. They took the item from the manager, and the entry in the balance-sheet shewed that they did so. I confess I cannot see that their omission to check his returns was a breach of their duty to the company. It is no part of an auditor's duty to take stock. No one contends that it is. He must rely on other people for details of the stock-in-trade on hand. In the case of a cotton mill he must rely on some skilled person for the materials necessary to enable him to enter the stock-in-trade at its proper value in the balance-sheet. In this case the auditors relied on the manager. He was a man of high character and of unquestioned competence. He was trusted by every one who knew him. The learned judge has held that the directors are not to be blamed for trusting him. The auditors had no suspicion that he was not to be trusted to give accurate information as to the stock-in-trade in hand, and they trusted him accordingly in that matter. But it is said they ought not to have done so, and for this reason. The stock journal shewed the quantities—that is, the weight in pounds—of the cotton and yarn at the end of each year. Other books shewed the quantities of cotton bought during the year and the quantities of yarn sold during the year. If these books had been compared by the auditors they would have found that the quantity of cotton and yarn in hand at the end of the year ought to be much less than the quantity shewn in the stock journal, and so much less that the value of the



cotton and yarn entered in the stock journal could not be right, or at all events was so abnormally large as to excite suspicion and demand further inquiry. This is the view taken by the learned judge. But, although it is no doubt true that such a process might have been gone through, and that, if gone through, the fraud would have been discovered, can it be truly said that the auditors were wanting in reasonable care in not thinking it necessary to test the managing director's return? I cannot bring myself to think they were, nor do I think that any jury of business men would take a different view. It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to any one before suspicion was aroused. The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential. I cannot think there was. The manager had no apparent conflict between his interest and his duty. His position was not similar to that of a cashier who has to account for the cash which he receives, and whose own account of his receipts and payments could not reasonably be taken by an auditor without further inquiry. The auditor's duty is not so onerous as the learned judge has held it to be. The order appealed from must be discharged with costs.

C. A.

1896

*In re*

KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lindley L.J.  
—

. LOPES L.J. This is an appeal by Messrs Pickering & Peasegood, auditors of the Kingston Cotton Mill Company, Limited, against an order of Vaughan Williams J. making them liable to make good to the assets of the company moneys of the company improperly applied in payment of dividends on the faith of certain balance-sheets certified by them.

A misfeasance summons was issued under s. 10 of the Companies (Winding-up) Act, 1890, against the directors and auditors. It was dismissed as to the directors, but the auditors were held liable.

Two questions of great importance arise: 1. What is

C. A.

1896

*In re*KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lopes L.J.

misfeasance within the meaning of s. 10? 2. Have the auditors in the circumstances of this case committed a misfeasance?

✓ It has been held that an auditor of a company is an officer within the meaning of the section: *In re London and General Bank*. (1) But has there been any misfeasance by the auditors? This depends upon what meaning is to be assigned to the word "misfeasance" as used in this section. The learned judge in the Court below held that misfeasance covered any misconduct by an officer of the company as such for which such officer might have been sued apart from the section. In my judgment this is too wide. It would cover any act of negligence—any actionable wrong by an officer of a company which did not involve any misapplication of the assets of the company. The object of this section of the Act is to enable the liquidator to recover any assets of the company improperly dealt with by any officer of the company, and must be interpreted bearing that object in view. It doubtless covers any breach of duty by an officer of the company in his capacity of officer resulting in any improper misapplication of the assets or property of the company.

This point was taken as a preliminary point, and it was said the Court had no jurisdiction. I cannot adopt this view, and I am of opinion that, if the case relied on could be established, the auditors would have committed a breach of duty within ✓ s. 10 of the Act.

But in determining whether any misfeasance or breach of duty has been committed, it is essential to consider what the duties of an auditor are. They are very fully described in *In re London and General Bank* (2), to which judgment I was a party. Shortly they may be stated thus: It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound. He is justified in believing tried servants of the

(1) [1895] 2 Ch. 166.

(2) [1895] 2 Ch. 673.

company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.

In the present case the accounts of the company had been for years falsified by the managing director, Jackson, who subsequently confessed the frauds he had committed. It is only, however, just to him to say that they were not committed with a view of putting money in his own pocket, but for the purpose of making things appear better than they really were and in the hope of the company ultimately recovering itself. Jackson deliberately overstated the quantities and values of the cotton and yarn in the company's mills. He did this for many years. It was proved that there is great waste in converting yarn into cotton, and the fluctuations of the market in the prices of cotton and yarn are exceptionally great. Jackson had been so successful in falsifying the accounts that what he had done was never detected or even suspected by the directors. The auditors adopted the entries of Jackson and inserted them in the balance-sheet as "per manager's certificate." It is not suggested but that the auditors acted honestly and honestly believed in the accuracy and reliability of Jackson. But it is said that they ought not to have trusted the figures of Jackson, but should have further investigated the matter. Jackson was a trusted officer of the company in whom the directors had every confidence; there was nothing on the face of the accounts to excite suspicion, and I cannot see how in the circumstances of the case it can be successfully contended that the auditors are wanting in skill, care, or caution in not testing Jackson's figures.

It is not the duty of an auditor to take stock; he is not a stock expert; there are many matters in respect of which he must rely on the honesty and accuracy of others. He does not guarantee the discovery of all fraud. I think the auditors were justified in this case in relying on the honesty and accuracy of Jackson, and were not called upon to make further investigation.

C. A.

1896

*In re*

KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lopes L.J.

C. A.

1896

*In re*KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Lopes L.J.

It is not unimportant to bear in mind that the learned judge has found the directors justified in relying on the figures of the managing director.

The duties of auditors must not be rendered too onerous. Their work is responsible and laborious, and the remuneration moderate. I should be sorry to see the liability of auditors extended any further than in *In re London and General Bank*. (1) Indeed, I only assented to that decision on account of the inconsistency of the statement made to the directors with the balance-sheet certified by the auditors and presented to the shareholders. This satisfied my mind that the auditors deliberately concealed that from the shareholders which they had communicated to the directors. It would be difficult to say this was not a breach of duty. Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold would make the position of an auditor intolerable. The appeal will be allowed.

KAY L.J. The question on this appeal is whether auditors who are officers of the company which is in liquidation have been properly held liable under s. 10 of the Companies (Winding-up) Act, 1890, for misfeasance. The misfeasance charged against them occurred in this manner. The manager of this company since the year 1887 has been making false entries in the books of the company of the quantity and value at the end of each year of its stock-in-trade. This, it appears, was done not from any corrupt motive of personal advantage, but because he was anxious to make the company appear more prosperous than in fact it was, believing that it was passing through a period of depression which would soon come to an end.

In the years 1890, 1891, and 1892 the auditors entered in the balance-sheets the values made out by the manager with the words "As per manager's certificate," without making any investigation as to the accuracy of the figures. The result of this

(1) [1895] 2 Ch. 673.



was that dividends were declared which ought not to have been and would not have been declared if the real state of the company had been known, and no doubt the catastrophe of the failure of the company was, if not occasioned, at least hastened by this falsification.

One of the questions argued was that, even if the auditors had committed a breach of duty in not attempting to examine the correctness of the manager's figures, the remedy should be by action and not by a summary proceeding under s. 10 of the Act of 1890. It was argued that the misfeasance intended by the section must be something in the nature of a breach of trust. The words of the section are, "any misfeasance or breach of trust in relation to the company." Therefore, misfeasance means something other than a breach of trust. It is said that it does not mean mere non-feasance: *Re Wedgwood Coal and Iron Co.* (1) And a dictum of James L.J. in *Coventry and Dixon's Case* (2) is relied on. It is a question of procedure. When may this summary procedure be adopted? It would be most inexpedient, and I think wrong, to so construe the word as to make it difficult to know whether a case came within it or not; and I think the only safe interpretation to adopt is that it includes all cases other than breaches of trust in which an officer of the company has been guilty of a breach of his duty as such officer which has caused pecuniary loss to the company by misapplication of its assets, and for which he might have been made liable in an action.

The question of real difficulty is whether the facts of this case do shew such a liability on the part of the auditors.

It appears that for years the auditors had been accustomed to accept without investigation the statement of the manager as to the value of the stock-in-trade at the end of each year. It seems obvious that the manager availed himself of this custom to falsify the books as to this item, knowing that if they pursued their usual course he could safely do this. The false entries began in 1887. In 1888 the stock-in-trade was valued at 21,775*l.* At the end of 1889 it was raised to 29,760*l.* The balance-sheet for 1890 began with that wrong amount. It

C. A.

1896

*In re*

KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

Kay L.J.  
—

(1) 47 L. T. (N.S.) 612.

(2) 14 Ch. D. 660.

C. A.  
1896  
*In re*  
KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).  
—  
Kay L.J.  
—

was increased in that year to 44,482*l*. In the account for 1891 that amount was carried on, and was increased at the end of the year to 53,918*l*. The wrong entry at the beginning of each year made the increase seem less than it would have appeared if the account had commenced with the correct figure; and thus one false entry assisted another, and the balance-sheets might be inflated enormously by a continuance of these falsifications.

The manager gave no certificate. That which was referred to in the balance-sheets by that name was his signature in a book called the "stock journal." That book contained entries of all stock stated to have been purchased during the year. By far the largest items were cotton and yarn—that is, raw and spun cotton. The weights of these in pounds and the value per pound are entered, and then the total values of the lots are carried out, and the sum of these values is the addition which should account for the increase of the year.

The auditors were not able to take stock, nor could they from any documents furnished to them test the value of the stock. That would depend on market prices at the date of the balance-sheet. But the books did afford a means of testing with some approach to accuracy the quantity of cotton obtained during the year and the quantity sold as yarn, and, deducting the weight of yarn sold from the weight of cotton bought, and making a further deduction for waste in the manufacture of yarn, the increase in quantity in the year could be roughly calculated. Adding this to the amount of cotton and yarn at the beginning of the year which the books also shewed, the quantity of cotton and yarn at the end of the year is ascertained. In this simple calculation there is one uncertain item—that is, the waste.

This calculation has been made as an example for the year 1891, which is one of the years in question. The result is that the stock journal is wrong as to the quantity of cotton and yarn to an amount of 583,935 lbs. weight beyond the true quantity. The estimated waste for the year in this calculation is 380,496 lbs. weight. This was said to be taken at a low average. If the amount of waste was larger, the

weight of cotton and yarn at the end of the year would be still less.

Now, the result of this investigation is to make it manifest that the value given by the manager must be greatly too much. The quantity of cotton and yarn at the beginning of the year was 1,316,270 lbs. At the end of the year it was 1,450,115. The increase during the year was, therefore, only 133,845. Taking this at 6*d.* a pound, which is more than the average value per pound of cotton shewn by the stock journal, the increase in value for the year would be only 3346*l.*, while the increase stated by the manager was 9436*l.*—nearly three times as much. But whatever the value was, the stock journal gave the weights and brought out the value at so much per pound weight, and the weights could be checked from the books with approximate accuracy. This was not attempted, and the question is whether the neglect to do this was a breach of duty for which the auditors can be held liable.

It is said that it is easy to be wise after the event. In former years when the stock journal was correctly entered the alterations in value in a year were frequently very considerable. The increase in the years now in question did not excite any suspicion in the directors. Why should it in the auditors? They had no reason to distrust the manager. Moreover, he had, or was supposed to have, taken the stock which was actually on the premises at the date to which the balance-sheets referred. The auditors could not do this. The only book from which they could obtain information as to the quantities received in the year other than the stock journal was a book called the "invoice guard book," in which were pasted the invoices received with goods supplied. But this was not necessarily accurate. Invoices received might have been omitted. Goods might in some cases have been received without invoices. Were the auditors bound to enter upon an investigation which could not bring out an accurate result in order to test the truth of a statement by the manager which no one had any reason to discredit?

It is of the highest importance that auditors, particularly, perhaps, in the case of joint stock companies, whose share-

C. A.

1896

*In re*

KINGSTON  
COTTON MILL  
COMPANY  
(No. 2).

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 Kay L.J.
 

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C. A.  
 1896  
 In re  
 KINGSTON  
 COTTON MILL  
 COMPANY  
 (No. 2).  
 Kay L.J.

holders are dependent chiefly on their intelligence and vigilance, should perform their duty with scrupulous care. But if they have conducted their work with that amount of skill and care which can reasonably be expected from men of business in their position, is there any rule of law by which they can be made liable?

If it was the duty of the auditors to test the statements of the manager in the manner suggested, or, indeed, in any manner, they were certainly guilty of negligence, for they made no attempt whatever to test them. The question is, was it their duty?

Upon the best consideration I can give to the case, I come to the conclusion that this was not their duty; and I therefore think that the decision of the learned judge should be reversed.

Solicitors: *Collyer-Bristow, Russell, Hill & Co.; Robbins, Billing & Co.*

H. C. J.

C. A.  
 1896  
 May 8, 11.

# KNIGHT v. SIMMONDS.

[1894 K. 990.]

*Injunction—Building Estate—Restrictive Covenants—Acquiescence—Alteration in Character of Estate.*

Where all the purchasers of lots of an estate are bound by restrictive covenants not to allow any trade or business to be carried on upon their lots, equitable relief in enforcing the covenants will be refused if the party suing has debarred himself from such relief by delay or acquiescence, or if the property has been so laid out and used that the object of the covenants, namely, the preserving the property as a residential property, can no longer be attained; but it will not be refused merely because in a few instances the covenants have not been enforced.

Decision of Romer J. affirmed.

THIS was an appeal by the defendant from a decision of Romer J. (1)

An estate was put up for sale by auction in 1852, under conditions which provided that each purchaser should covenant with the vendor, his heirs, &c., that no trade or business should



be carried on upon the lots purchased by him. The plaintiff Knight bought in 1881 from a purchaser of one of the lots. Other lots were sold to Buckle and Philps, who by their conveyances of May 30, 1853, entered into the above covenant, and then formed a sub-scheme, and sold the property so purchased by them in sub-lots; and Buckle and Philps and their sub-purchasers entered into a deed of mutual covenants, dated June 14, 1853, providing that no offensive trade should be carried on upon any of the sub-lots. The plaintiff Williams was purchaser of some of these sub-lots. The defendant in 1893 purchased others of the sub-lots with notice of the deed of May 30, 1853, and proceeded to erect a large laundry upon the property so purchased by him, with the intention of carrying on the business of a laundryman. Knight and Williams brought an action for an injunction. The defence set up was that laundries had been carried on upon several of the lots for years without objection, and that some other trades had also been carried on for a length of time. Romer J. found as a matter of fact that such breaches of the scheme and covenants as there had been were trivial and privately carried on, and that there had been no acquiescence on the part of the residents in breaches of the scheme. His Lordship accordingly held that Knight was entitled to an injunction, but that Williams could only enforce the covenants in the deed of June 14, 1853, and was not entitled to any relief, as the carrying on a laundry was not an offensive business. The defendant appealed.

*Eve, Q.C.*, and *Macnaghten*, for the appeal. We say that a change had come over the land before Knight came to it, and that from the time he came he knew that the restrictive covenants had ceased to be enforced. We say that the evidence establishes this. The case comes within *Sayers v. Collyer*. (1) Here a number of businesses were carried on upon the property without any concealment; there was a general acquiescence in the breach of the covenants, not, as in *German v. Chapman* (2), a permission given to a single individual.

[At the close of the sitting the Court said that they would

(1) 28 Ch. D. 103.

(2) 7 Ch. D. 271.

C. A. state on Monday whether they would call on *Astbury, Q.C.*,  
1896 and *R. M. Bray*, who appeared for Knight.]

KNIGHT  
v.  
SIMMONDS.

May 11. LINDLEY L.J. We have all had an opportunity of considering this case, and we are of opinion that we need not call on counsel for the respondent.

The action is brought to enforce a restrictive covenant, and is brought by the purchaser of one lot of a property which was laid out for building purposes against the purchaser of another lot. The property in question formerly belonged to Lord Cottenham, and was purchased by Mr. Finch, who in 1852 laid it out for building. It was sold subject to certain conditions of sale which were afterwards embodied in covenants, the only one to which I need refer being a covenant that no trade or business should be carried on upon the lot. The property was 250 acres, and it was sold for the purpose of building residential houses. In the next year, 1853, Finch, the owner of the property which had not been sold, sold a portion to two persons named Buckle and Philps, and they laid out what is called a sub-scheme; but they entered into similar absolute covenants with Finch that no trade or business should be carried on upon the property. The defendant has bought some portion of the property with notice of that covenant. The express covenants entered into by his predecessors in title in June, 1853, do not go so far; but it is admitted that he bought with notice of the absolute covenant, and that such notice was given to him before his purchase was completed. He bought in 1893, but the land which he bought had been up to that time vacant. Now he has begun to carry on business as a laundryman, and his defence is that this is not a proper case in which to enforce the restrictive covenant against him, because the nature and the character of the property have been altered.

Now, with reference to that, Romer J. has found that the character of this property has not been altered, that all the houses were built for and have been used for residential purposes, though in some corner of the property bought from Buckle and Philps people who have bought places which look

like residences have more or less carried on some kind of business. Having attended carefully to the evidence brought to our attention by the counsel for the appellant, we do not see the slightest reason for disagreeing with Romer J. on his view of the facts, and therefore I shall take them as found by him. [His Lordship here read from the middle of p. 662 of the report below to the middle of p. 663, and the first nineteen lines of p. 664.]

Under these circumstances I should have thought the case was tolerably plain; but reliance was placed by Mr. Eve and Mr. Macnaghten on some observations which fell from the Court in *Sayers v. Collyer* (1), which induced me to look into the authorities on a subject with which we are all more or less familiar, but which I have not had occasion to consult for some time. I will state the result of those authorities as I understand them. In the first place, it is to be observed that these covenants do not run at law with the land. That is plain. The breaches were not disputed; but the defences were, as I have stated, a change in the character of the neighbourhood and acquiescence in breaches. When a Court of Equity is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words, when equitable as distinguished from legal relief is sought, equitable as distinguished from legal defences have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it. *Sayers v. Collyer* (1) and *Roper v. Williams* (2) illustrate this. In both of those cases the Court refused to enforce restrictive covenants at the instance of the particular plaintiffs. But, further, before granting equitable relief, Courts of Equity look not only to the words of a covenant, but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused. This doctrine was laid down and acted upon by Lord Eldon and Sir Thomas Plumer in *Duke of Bedford v. Trustees of the British*

C. A.

1896

KNIGHT

v.

SIMMONDS.

Lindley L.J.

(1) 28 Ch. D. 103.

(2) T. &amp; R. 18.

C. A.  
 1896  
 KNIGHT  
 v.  
 SIMMONDS.  
 Lindley L.J.

*Museum* (1), and by Wood V.-C. in *Peek v. Matthews* (2), and was recognised in *German v. Chapman*. (3) It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible. Such a state of things can seldom if ever have arisen except from a departure by the vendor and the purchasers from him from the scheme, or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but, whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused. Nor do I understand the observations of Bowen and Fry L.JJ. in *Sayers v. Collyer* (4) to be opposed to this view of the law. Their object evidently was, not to discredit the cases I have referred to, but rather to guard against a loose application of the principle on which they proceed.

Some expressions of Lord Eldon in *Roper v. Williams* (5) and *Duke of Bedford v. Trustees of the British Museum* (1) led to the notion that if a restrictive covenant for the preservation of a building estate was not enforced in all cases it could not be enforced in equity in any. But this notion was emphatically protested against by the Court of Appeal in *German v. Chapman* (3), and its error had been previously pointed out by Wood V.-C. in *Mitchell v. Steward*. (6) In *German v. Chapman* (3) James L.J. says (7): "If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the

(1) 2 My. & K. 552.

(2) L. R. 3 Eq. 515.

(3) 7 Ch. D. 271.

(4) 28 Ch. D. 103.

(5) T. & R. 18.

(6) L. R. 1 Eq. 541, 547.

(7) 7 Ch. D. 279.



court for the purpose merely of harassing and annoying some particular man, where the Court could see he was not doing it bonâ fide for the purpose of effecting the object for which the covenant was originally entered into. That is very different from the case we have before us, where the plaintiff says that in one particular spot far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons could not do an act of kindness, or from any motive whatever relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate. It appears to me it is impossible to apply the principles of *Roper v. Williams* (1) and *Peek v. Matthews* (2) to such a case as this."

The evidence in the present case shews that, except in a few instances of no real importance, the restrictive covenants entered into with the vendor when the property was sold in lots for building purposes have always been observed. There has been no departure worth mentioning from the scheme originally adopted.

The case, therefore, falls within *German v. Chapman* (3), and not within *Duke of Bedford v. Trustees of the British Museum* (4) and *Peek v. Matthews*. (2)

It is not necessary to examine the evidence. Mr. Eve called our attention to it, but without displacing the conclusions arrived at by Romer J. The facts as found by him are clearly warranted by the evidence, and no grounds have been shewn to disentitle the plaintiff Knight from the relief which he sought

C. A.

1896

KNIGHT

v.

SIMMONDS.

Lindley L.J.

(1) T. &amp; R. 18.

(2) L. R. 3 Eq. 515.

(3) 7 Ch. D. 271.

(4) 2 My. &amp; K. 552.

C. A. and which he has obtained. The appeal must be dismissed  
1896 with costs.

KNIGHT  
v.  
SIMMONDS.

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LOPES L.J. I am of the same opinion. This was an estate consisting of 250 acres, which was sold in the year 1852 in fifty-four lots. There were restrictive covenants. The defendant bought in 1893 a portion of the estate with full notice of those restrictive covenants. Now it appears to me that, if the law laid down in *German v. Chapman* (1) is correct, the judge has found the appellant out of court. According to that case, as I understand it, the defendant was bound to establish that the property had been so substantially changed, that the whole character of the place or neighbourhood had been so altered, that the object with which the covenant was originally entered into was to be considered at an end. The learned judge has found, on the contrary, that the nature and character of the property is not changed. Under these circumstances, the case must be governed by *German v. Chapman* (1), and the appeal fails. I will only add that, on looking at the evidence, I entirely agree with the finding of Romer J.

KAY L.J. I am of the same opinion, and I shall only add one or two observations. The case is one undoubtedly in which this land has been laid out under a general building scheme, and intimation was given at the time when it was so laid out that every purchaser of a plot of land would be required to enter into a covenant that no trade or business should be carried on upon the piece of land that he bought. Those covenants were in fact entered into by most if not all of the purchasers of the different plots of land. The plaintiff's plot of land was purchased before that which is now held by the defendant. The plaintiff's predecessor in title when he purchased entered into a covenant which, however, was not quite in the correct form, because it was not to carry on any trade or business without the consent in writing of the vendor. However, I do not think anything turns upon that in this particular case.

The defendant's predecessors in title purchased afterwards,

(1) 7 Ch. D. 271.

and when they purchased they entered into a covenant not to carry on any trade or business upon the land so purchased.

Now the defendant bought his land with distinct notice that his predecessors had entered into that covenant. And, these covenants being imposed for the purpose of keeping the whole of this property as a residential property, they were covenants to carry out a building scheme in the truest sense of those words, and, therefore, in equity, although the covenants did not run at law, they were covenants entered into for the benefit of each of the several purchasers of lots upon this building estate, and, accordingly, any one of those purchasers has a right in equity, although not at law, to enforce such a covenant against the purchaser of any other lot, and in equity it is just the same as if the defendant or the defendant's predecessor had entered into that covenant with the predecessor in title of the plaintiff directly.

The covenants having been so made, what took place was this. When the defendant took possession of the plot of land he had purchased, it was vacant land, and he began to erect a building which evidently was to be used as a laundry on an extensive scale. Thereupon the plaintiff gave him notice that that would be objected to; and nevertheless he went on and insisted on building his laundry. Accordingly, this action was brought in equity by the plaintiff against the defendant to restrain him from carrying on the business of a laundryman upon the property which he had so bought.

What is the answer? The answer is twofold. The answer is, "First of all, you, the plaintiff, have by your conduct disentitled yourself to obtain such an injunction because you have acquiesced in many people carrying on laundry businesses, not upon this particular plot bought by the defendant, but upon other parts of the estate, and, secondly, even if your conduct does not disentitle you, still the character of the whole property has been so changed that it is no longer a residential property upon which no one may carry on a trade or business."

Now, I am not going into the facts at all, because, having listened attentively to all the evidence brought to our notice during the argument, I agree entirely with the findings of the

C. A.

1896

KNIGHT  
v.  
SIMMONDS,  
Kay L.J.

C. A.  
1896  
KNIGHT  
v.  
SIMMONDS.  
Kay L.J.

learned judge, first, that the plaintiff never did acquiesce in such a way as to bind himself not to enforce this covenant against the defendant, and, secondly, that the character of this property has not so far been altered that it has ceased to be a residential estate, so that the plaintiff for that reason, apart from acquiescence, would lose his right to enforce this covenant against the defendant.

I wish only to add this : that if that last reason is relied on, where a defendant is, as this defendant is, in the same position in equity as if his predecessor in title had entered into a direct covenant with the plaintiff's predecessor in title not to carry on a trade or business, the alteration of the estate must be a very considerable one indeed if it prevents the plaintiff from enforcing in equity that covenant against him. It is obvious that a trade might be carried on in some remote part of this property without doing this particular plaintiff any injury whatever, and if it were to be held that he would lose his right altogether unless he brought an action against every one who has infringed the covenant, although the infringement did him no kind of damage, the object and purpose of the covenant would be lost entirely, and I do not think any case has gone so far. I should hesitate very much before I came to the conclusion that one instance, or it may be half a dozen instances, upon a building estate of this size, in which the plaintiff had not taken proceedings to stop the infringement of the covenant, would prevent him from taking proceedings against a man who, like this defendant, was infringing the covenant in such proximity to the plaintiff's house as to do him necessarily a great amount of damage.

I think the appeal entirely fails, and it must be dismissed with costs.

Solicitor for appellant : *J. Bartlett.*

Solicitors for respondent : *Jenkins, Baker & Co.*

H. C. J.



STAPLES *v.* EASTMAN PHOTOGRAPHIC MATERIALS  
COMPANY.

[1896 S. 361.]

C. A.

1896

May 13.

*Preference Shares—Cumulative Dividend—Payment out of Net Profits of each Year.*

The memorandum of association of a company contained this clause: “The capital of the company is 150,000*l.*, divided into 10,000 ordinary shares of 10*l.* each, and 5000 preference shares of 10*l.* each. The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10*l.* per cent. per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend the holders of ordinary shares shall be entitled to a like dividend at the rate of 10*l.* per cent. per annum on the amount paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend” :—

*Held* (reversing the decision of Chitty J.), that the preference shareholders were not entitled to a cumulative dividend of 10*l.* per cent. so as to have the deficiency in one year paid out of the profits of a subsequent year before paying anything to the ordinary shareholders.

*Henry v. Great Northern Ry. Co.* (1 De G. & J. 606) and *Webb v. Earle* (L. R. 20 Eq. 556) distinguished.

THE company was registered in November, 1889, and the 5th clause of the memorandum of association was as follows :—

“ The capital of the company is 150,000*l.*, divided into 10,000 ordinary shares of 10*l.* each, and 5000 preference shares of 10*l.* each. The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10*l.* per cent. per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend the holders of ordinary shares shall be entitled to a like dividend at the rate of 10*l.* per cent. per annum on the amount paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend.”

For the year 1890, 10*l.* per cent. was paid on the preference shares, and 5*l.* per cent. on the ordinary shares ; for 1891, 10*l.* per cent. on the preference shares, and 7*l.* per cent. on the

C. A.  
1896  
STAPLES  
v.  
EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.

ordinary shares; for 1892 no dividend was paid; for 1893, 5*l.* per cent. was paid on the preference shares only; for 1894, 2*l.* 10*s.* per cent. on preference shares only. For 1895 a substantial profit was made, and the directors proposed to pay 10*l.* per cent. to the preference shareholders and a dividend to the ordinary shareholders.

This action was commenced by Staples on behalf of himself and all other the preference shareholders, asking a declaration that the preference shareholders were entitled to be paid a dividend of 10*l.* per cent. for the years 1892, 1893, and 1894, and that the deficiency must be made good before any payment in respect of dividends on the ordinary shares.

Chitty J. decided in accordance with the plaintiffs' contention.

*Buckley, Q.C., Levett, Q.C., and Kerly*, for the ordinary shareholders, in support of the appeal. The clause in the memorandum is, on its true construction, a provision as to the mode of dividing the profits of each year. The word "dividend" is inaccurately used to denote a share of profits. The scheme is this: First pay a dividend at the rate of 10*l.* per cent. per annum to the preference shareholders; if there is a surplus pay out of it a dividend at the rate of 10*l.* per cent. per annum to the ordinary shareholders; and if anything remains divide it between all the shareholders. This process is to be gone through every year. When the dividend to the preference shareholders has been paid, the ordinary shareholders are to take "a like dividend," i.e. 10*l.* per cent. out of the profits of that year. The judge has not attached sufficient importance to the words "out of the net profits of each year." To entitle preference shareholders to a cumulative dividend there must be some words to give it. In *Henry v. Great Northern Ry. Co.* (1) the resolution provided that the preference shareholders should be entitled to "interest or dividends" at the rate of 5*l.* per cent. per annum in perpetuity, which would naturally give a cumulative dividend, and the use of the word "interest," though inaccurate, shews the intention. So in *Webb v. Earle* (2) the words were "a dividend

(1) 1 De G. & J. 606.

(2) L. R. 20 Eq. 556.

of 10*l.* per cent. per annum payable half-yearly," with no indication out of what it was to be paid.

[They were then stopped by the Court.]

*Latham, Q.C.*, and *Gatey*, for the preference shareholders. We submit that the clause is divisible into two parts. The latter part of it expresses what the preference shareholder is entitled to: a yearly preference dividend of 10*l.* per cent.; and the first part indicates out of what it is to be paid. The profits of each year are to be divided according to this rule: that the preference shareholders are first entitled to a preference dividend of 10*l.* per cent. per annum, and then the ordinary shareholders to a like preference dividend, both being cumulative. This is the common case with preference dividends of railway companies. The contention of the appellants gives a strong construction to the words "of each year," and makes the words "per annum" wholly superfluous.

*C. Lyttelton Chubb*, for the company.

A reply was not called for.

LINDLEY L.J. We cannot any of us construe this clause in the way in which the learned judge has done. I will read the clause: "The capital of the company is 150,000*l.*, divided into 10,000 ordinary shares of 10*l.* each, and 5000 preference shares of 10*l.* each." The question before us is, what is the preference given to the holders of preference shares? Are they to have cumulative dividends, or are they to have dividends only according to the share of profits in each year in which there are profits? The language is this: "The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10*l.* per cent. per annum on the amount for the time being paid or deemed to be paid up thereon." What is the meaning of that? Is that the language employed when it is intended to give a cumulative dividend so that if there are no profits in one year the arrears of dividend are to be carried forward and paid out of the profits of the subsequent years? I confess I do not think that is so. I should have said that the obvious meaning of these words was that the profits of each year were to be divided in this way—

C. A

1896

STAPLES

v.

EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.

C. A.  
1896  
~  
STAPLES  
v.  
EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.  
—  
Lindley L.J.

there is 10 per cent. to go in the first place to the preference shareholders, and then, under the next clause, a like dividend to the ordinary shareholders. Chitty J. has acceded to the view pressed upon him by Mr. Latham that it is to be read thus: "The holders of preference shares shall be entitled to 10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon, and such 10 per cent. is to be paid out of the net profits of each year." If that were the meaning of the language the decision would be right; but I do not think that is its meaning. It appears to me that the reference of the dividend to the profits of each year is most marked. It is suggested that the clause means they are to have per annum 10 per cent.; but so to read it is to refer "per annum" to the wrong antecedent. "Per annum" refers to the rate and nothing else. The ordinary meaning of the language of this clause appears to me to be this: that the profits of each year are to be divided as follows—give 10 per cent. first to the preference shareholders, and then, if the profits are sufficient for the purpose, 10 per cent. to the ordinary shareholders, and then, if there is a surplus, that is to be divided equally amongst the shareholders. That is the view which I take, and I do not think any of the cases warrant a decision to the contrary. The language in *Henry v. Great Northern Ry. Co.* (1) was such as to make it tolerably plain that what was there promised to the preference shareholders was 10 per cent., and it was called interest or dividend. In the case of *Webb v. Earle* (2) the words were "a dividend of 10 per cent. per annum payable half-yearly" without any such context as we have here—without anything to shew out of what it was to be paid. With deference to Chitty J., I think that this language does not entitle the preference shareholders to a cumulative dividend, and the appeal must be allowed.

LOPES L.J. If it had not been that Chitty J. thought otherwise, I certainly should have thought the words in question almost too clear for argument. They are these: "The holders of preference shares shall be entitled out of the net profits for

(1) 1 De G. & J. 606.

(2) L. R. 20 Eq. 556.



each year to a preference dividend at the rate of 10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon." I read that to mean this: "shall be entitled to a share at the rate of 10 per cent. per annum of the profits accruing in the particular year." If it is read in any other way, no effect whatever is given to the words "net profits of each year." Chitty J. has transposed the sentence, or some words of the sentence. If they could be so transposed that might give colour to the contention of Mr. Latham. But why are we to transpose them? I presume they were deliberately set in the places in which we find them. We find these words "net profits of each year," not towards the end of the sentence, as Chitty J. has been inclined to place them, but put in the most prominent and governing place, namely, "entitled out of the net profits of each year." I cannot come to any other conclusion but that the clause does not entitle the preference shareholders, nor, indeed, the ordinary shareholders if such a case arose, to anything in the shape of cumulative dividends. It plainly means that you are to take the profits of each year, and then you are to pay 10 per cent. out of those profits to the preference shareholders. If there is more than enough to pay them their 10 per cent., then you are to pay 10 per cent., or as much as you can, to the ordinary shareholders. If there is enough to pay 10 per cent. both to the preference shareholders and to the ordinary shareholders, then the surplus is to be divided among the two classes of shareholders. I cannot help thinking that that is the only reasonable construction that can be placed upon these words.

KAY L.J. I differ with respect from the decision at which the learned judge has arrived in this case. I think the meaning of this clause is reasonably clear. It is dealing in effect with the profits of each year, and the word "dividend" used in this clause, looking at the context, seems to me to have simply the meaning of share of the profits in each year. Dividend is used, as Mr. Buckley pointed out, in a somewhat inaccurate manner in cases of this kind. I suppose it is taken from *dividendum*, the thing to be divided; but it is used in ordinary commercial

C. A.  
1896  
STAPLES  
v.  
EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.  
Lopes L.J.

C. A.  
1896  
STAPLES  
v.  
EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.  
Kay L.J.

language as the share of the thing to be divided—that share which is coming to each person who is entitled to share in that division. That is undoubtedly the meaning in which it is used in this particular clause. Take the first words: “The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend.” There dividend must mean a share of the net profits each year. So that substituting the word “share” you make it quite plain. “The holders of preference shares shall be entitled out of the net profits of each year to a preference share of those profits.” That is the undoubted meaning, I think, from the context of the word “dividend” in that clause. Then it goes on to give a mode of calculating what is the share of those profits that each preference shareholder is to be entitled to. It is to be at the rate of 10 per cent. per annum on the amount for the time being paid, or deemed to be paid up, thereon. That simply shews that according to the amount paid upon each share is to be the share of the profits to which the shareholder is to be entitled. It is to be calculated at the rate of 10 per cent. per annum. But the subsequent words seem to me to be very important too. The next words are, “after payment of such preferential dividend”—that means after payment of that share of the profits of each year—“the holders of ordinary shares shall be entitled to a like dividend at the rate of 10 per cent. per annum on the amount paid or deemed to be paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend.” According to the argument in support of the judgment of the learned judge those words would have to be read, not merely after payment of such preferential dividend, not merely after payment of such share of the profits of each year, but after payment of such shares and all arrears in previous years of the preferential dividend. It seems quite impossible, consistently with ordinary grammatical interpretation, to give that meaning to the words “after payment of such preferential dividend.” The real meaning of this clause seems to me to be a direction how the profits of each year are to be divided between the two classes of shareholders. Transposing and paraphrasing the words, they would run thus :

"The profits of each year shall be divided in the following manner, namely, in payment to the preference shareholders of a dividend equal to 10 per cent. per annum upon the money paid on their respective shares, then a like dividend of 10 per cent. to the ordinary shareholders, and if any balance remains it shall be divided rateably between the two classes." That seems to me to be the meaning of this clause. It is urged that great stress must be laid upon the words "per annum," and Mr. Latham wishes us to construe it, as I understand his argument, "The holders of preference shares shall be entitled to a dividend per annum at the rate of 10 per cent.," as though there were first an absolute provision without reference to the profits of a particular year, and indications afterwards of the profits out of which the dividend is to be paid. I quite agree if it could be read in that way that would very much advance the respondents' argument. But I do not think it is possible, consistently with ordinary rules of construction, to give that meaning to this clause. I do not find any provision that the holders of preference shares are to be entitled in any event to a dividend per annum at the rate of 10 per cent. I can only find an indication that out of the profits of each year that shall be their share of those profits. I quite agree, also, the clause might have been made more explicit by adding the words suggested by Mr. Latham, "shall be entitled to a dividend out of the profits of such year"; but it seems to me that would only be a more explicit expression of that which is tacitly here, if not explicitly here, in the words which I have read. I therefore cannot follow the argument which has been addressed to us in support of the judgment.

In reference to the cases, I will only refer to one of them, *Henry v. Great Northern Ry. Co.* (1) The whole of that decision rested upon this: that there was, without indication of any special fund out of which it was to be paid, a declaration, on the faith of which parties took the shares which were there in question, that such shares should be entitled to "interest or preference dividend at the rate of £5 per cent. per annum in perpetuity"; and the key of the decision is to my

(1) 1 De G. &amp; J. 606.

C. A.  
1896  
STAPLES  
v.  
EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.  
Kay L.J.

C. A.  
1896  
STAPLES  
v.  
EASTMAN  
PHOTO-  
GRAPHIC  
MATERIALS  
COMPANY.  
Kay L.J.

mind in the words of Turner L.J.'s judgment (1): "It seems to me to be clear, that the expression 'preference dividend' in that report was used in the sense of interest." I will take the illustration which was used in the argument before us here. If partners in a trading concern had capital in that concern in unequal shares, and there was a provision that first of all out of any profits which should be made in trading 5 per cent. should be paid upon that capital, that, I agree, would be a payment in the nature of a debt by the concern to its several partners, and that payment would not depend upon the question whether profits were made in the particular year; but it being in the nature of a debt, it would be an overriding obligation before any profits could be divided in any year—an obligation that they should completely discharge that particular debt. That is exactly what I do not find here. I think there is here only, as I have said, an indication of the way in which the profits of each year are to be divided, and I have added these observations simply out of respect to the learned judge from whose decision we have been compelled to differ.

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The Court, being of opinion that there is no cumulative dividend, dismisses the action, and the company not objecting, let them pay the costs of the action and of the appeal.

Solicitors: *Kerly, Son & Verden; Young & Sons; Barraud, Regge & Jupp.*

(1) 1 De G. & J. 648.

H. C. J.



\*  
*In re* CAREW.  
CAREW *v.* CAREW.

[1889 C. 4289.]

C. A.  
1896  
May 12, 13,  
19.

*Will—Construction—“Legal Disability” preventing Donee from taking the Property for his own Benefit.*

A testator, subject to a life estate to his wife, gave half his residuary estate to his son; but in case the son should at the death of the wife be “under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit,” the testator gave the same over to the son’s wife and children.

Shortly before the widow’s death the son, who was one of the executors, was found indebted to the estate in 5188*l.*, and an order was made directing him to pay that sum, and declaring his interest under the will liable to make it good. He had also heavily incumbered his interest:—

*Held* (affirming the decision of Stirling J.), that “legal disability” meant a disability of the person arising from act of law, and that neither the charge by the order nor the mortgages created such a legal disability as would cause the gift over to take effect.

The son on the day of his mother’s death, but before her death, was adjudicated bankrupt on his own application; but in a few days the adjudication was annulled on the ground that it ought never to have been made.

*Held* (affirming the decision of Stirling J.), that this bankruptcy, having been a mere contrivance on the part of the son, ought not to be regarded.

THIS was an appeal by the wife and children of H. G. Carew from a decision of Stirling J. (1), that a gift over to them of a moiety of the residuary estate of George Carew had not taken effect.

George Carew, a solicitor, by will dated January 11, 1886, gave the income of his residuary estate to his wife for her life, and, subject thereto, he gave one moiety thereof to his granddaughter Jessie Carew, with powers of maintenance and accumulation, “and as to the other moiety thereof, and in case of the death under age of my said granddaughter, then as to the entirety of my said worldly estate and property, I give the same subject as aforesaid to my son Henry George Carew; but if he should predecease either my said wife or me, or in case of his being, at the time of the death of the survivor of my said wife and me,

(1) [1896] 1 Ch. 527.

C. A.  
1896  
~~~~~  
In re
CAREW.
CAREW
v.
CAREW.

under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit, I give the same subject as aforesaid unto his widow or wife and children (other than the said Jessie Carew) living at, &c." On April 2, 1886, the testator died. His widow and Henry George Carew, who were appointed executors, proved the will.

In the present action, which was for the administration of the testator's estate, H. G. Carew was found indebted to the state in 5188*l.* 16*s.* 10*d.*; and on January 30, 1895, an order was made on further consideration ordering him to pay that sum to the plaintiffs as the present trustees of the testator's will; and it was declared, without prejudice to any claim of the wife and children of Henry George Carew, that the interest (if any) coming to him under the testator's will was liable to make good to the testator's estate the said 5188*l.* 16*s.* 10*d.*

In 1893 and 1894 H. G. Carew made several other mortgages of his interest under the will; and ultimately on September 7, 1894, he assigned all his interest to a trustee to raise 2500*l.* for his wife and children, and subject thereto in trust for himself.

Jessie Carew, in the will named, attained twenty-one, and married Charles Theodore Weston.

On March 16, 1895, Mrs. Carew, the widow of the testator, died. On the same day, but before the death of Mrs. Carew, a receiving order and an order of adjudication in bankruptcy were upon his own application made against Henry George Carew. On April 4 an order was made whereby the receiving order and order of adjudication of March 16 and all subsequent proceedings were annulled on the ground, as expressed in the order, that the receiving order and order of adjudication ought not to have been made.

Under these circumstances a summons was taken out by the surviving trustee of the testator's will, asking that it might be declared who, according to the true construction of the will and in the events which had happened, were entitled to Henry George Carew's moiety.

Stirling J. held that the gift over of H. G. Carew's moiety had not taken effect. His wife and children appealed.

Grosvenor Woods, Q.C., and *Phillpotts*, for the appellants. Their arguments upon the appeal were similar to those addressed by them to the learned judge in the Court below, which are fully given in the report of the hearing before him; and in addition to the authorities cited by them on that occasion, they referred to *Re Dash* (1), in which case under the terms of a will a trust of a life interest in favour of a legatee was to be void in case he should (inter alia) by his own act or by operation of law be deprived of the absolute personal enjoyment of it; and it was held that the legatee, who had been convicted of felony and sentenced to ten years' penal servitude but had obtained a ticket-of-leave, had not forfeited his life interest under the will.

Hastings, Q.C., and *Rawlins, Q.C.*, for the respondent, Mrs. Jessie Weston, likewise addressed to the Court arguments similar to those given in the previous report; and with reference to the effect of the order on further consideration of January 30, 1895, they contended as follows:—

By that order H. G. Carew was ordered to pay to the trustees of the will 5188*l.* 16*s.* 10*d.* found to be due from him, and it was declared that any interest coming to him under the will was liable to make that sum good to the estate. He must, therefore, be treated as being precluded from receiving any further part of the testator's estate for his own benefit until the other cestuis que trust have received as much as he has possessed himself. He is in fact a beneficiary who is a defaulting trustee, and has by anticipation received or retained payment of his share: *Irby v. Irby* (2); *Jacubs v. Rylance*. (3) He was not, however, under any "legal disability" at the death of the widow of the testator. His only disability was the lack of means.

Henry Fellows, for Francis Dashwood, the first incumbrancer.

Theodore Ribton, for a judgment creditor of H. G. Carew.

W. C. Fooks, for the Legal Reversionary Investment Society.

Elgood, for an incumbrancer.

C. E. Bovill, for the trustees of the will.

(1) 57 L. T. (N.S.) 219.

(2) 25 Beav. 632.

(3) L. R. 17 Eq. 341.

C. A.
1896
In re
CAREW.
CAREW
v.
CAREW.

Grosvenor Woods, Q.C., in reply. The rule in the construction of wills is that the Court should neither deviate from the literal sense of the words without sufficient reason, nor adhere so slavishly to them as to defeat the intention of the testator: Lord Blackburn in *River Wear Commissioners v. Adamson* (1), citing from *Allgood v. Blake*. (2) Here the dominant idea in the testator's mind is personal enjoyment on the part of the legatee: he is not to take anything unless he can personally take it and enjoy it; but there is no reference to status. As to status: Bankruptcy is not a change of status. There is a *cessio bonorum*, but a bankrupt is not civilly dead. He can contract, and an uncertificated bankrupt has a title against all the world except his assignees: *Semple v. London and Birmingham Ry. Co.* (3) It is doubtful whether lunacy would be a disability within the meaning of the testator, for a lunatic's property is administered for his benefit. So in the case of felony, the property is administered for the benefit of the felon and his wife and family. Looking at the context here, the words "legal disability" mean a disability to receive, and the word "legal" only imports that it is such a disability as the law will recognise.

Cur. adv. vult.

May 19. LINDLEY L.J. The question raised by this appeal turns on the true construction of a clause in the will of a solicitor. The will and the facts are set forth in the report in the Court below. [His Lordship then referred to the will, to the bankruptcy of H. G. Carew and the order annulling it, and to the order on further consideration of January 30, 1895.]

There are two ways of construing the clause in the will relating to the son's share. One is that on the death of his mother the son is to be entitled to one-half of the residuary estate, unless he is at that time under some legal disability which prevents him from taking and enjoying that half for his own personal and exclusive benefit. The other is that on the death of his mother the son is to be entitled to one-half of the

(1) 2 App. Cas. 743, 765.

(2) L. R. 8 Ex. 160, 163.

(3) 9 Sim. 209.

residuary estate, unless something has occurred which legally prevents him from taking and enjoying that half for his own personal and exclusive benefit.

There is no context to shew more precisely than the clause itself does what the testator really meant. The first of the above constructions is the more literal of the two; but it is open to the objection that the meaning of being under a legal disability is not free from ambiguity. Such words have no precise technical meaning. But the explanations given of "ability" in Comyns' Digest, and of "disability" in Jacob's and Tomlins's Law Dictionaries, lead me to infer that legal disability would include bankruptcy, conviction for felony, attainder for treason, and lunacy. Infancy need not be considered, as the son was over twenty-one when the will was made. An alienation would not create a legal disability, still less would a mortgage or charge. In this case the son had procured himself to be made bankrupt; but the bankruptcy was annulled as being a mere device and trick, and it ought to be disregarded accordingly. The son was at his mother's death *sui juris* in all respects; he was under no legal disability of any kind; and if the first construction is the right one, he became entitled to one-half the property subject to the payment of the amounts charged upon it.

The second of the above constructions is open to the objection that it departs more than the first from the words of the clause, and further, that this construction leads to results which it is difficult to suppose the testator really intended. The clause is not so worded as to amount to a gift to the son until alienation, and then to his wife and children, and it can hardly be supposed that the testator meant that his son was not to have anything if he aliened or charged his half before his mother's death, but was to be at liberty to alien or charge it as soon as she was dead. The words do not warrant the inference that a mere incumbrance by the son existing at his mother's death was to deprive him of all benefit under the will. Inability to pay off a debt charged upon property may prevent the owner from ever actually personally enjoying the property; but such inability can hardly be described as a legal disability

C. A.

1896

In re
CAREW.CAREW
v.

CAREW.

Lindley L.J.

C. A.
1896

In re
CAREW.
CAREW
v.
CAREW.

preventing him from enjoying it. On these grounds, I am of opinion that the first construction is the sounder of the two. The appeal, therefore, must be dismissed with costs.

LOPES L.J. I am of the same opinion. I think the limitations in this will are alternative limitations, and the important words are: "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal exclusive benefit." The governing words there are, in my judgment, "legal disability." What did the testator mean by "legal disability"? I think he meant a disability by act of law; not a disability created by Carew himself, but a personal disability imposed on him by the law, not voluntarily created, but imposed in invitum, such, for instance, as bankruptcy, or conviction for felony, or attainder for treason, and, in my judgment, also lunacy. I cannot think, having regard to the words used in the will, that the testator ever intended that those words should include a mortgage or a charge, or that he ever thought of those being such a disability as he was dealing with. If that were the legal conclusion, any small charge made a week before the mother's death would bring the case within the words—a small charge which he could pay off a fortnight afterwards. I cannot think the testator ever intended a disability arising from mere impecuniosity to have such an effect. I therefore am of opinion that the learned judge in the Court below was perfectly right in the view he took of the true construction of this will, and that the appeal must be dismissed.

KAY L.J. This appeal raises a question of construction of the will of George Carew, who was a solicitor. He died in 1886, leaving a will by which he gave his residuary property to his wife for life, and subject thereto one moiety to his granddaughter Jessie, and the other moiety to his son Henry, and the will continued: "but if he should predecease either my said wife or me or in case of his being at the time of the death of the survivor of my said wife and me under any legal disability in consequence whereof he would be hindered in or prevented

from taking the same for his own personal and exclusive benefit," the testator gave his share to his wife and children other than Jessie. Henry and the widow were executors, and proved the will.

Henry mortgaged his interest under the will. He received assets of the testator to the amount of 5188*l.*, and that sum is still due from him.

When the testator's widow was at the point of death, he, for the purpose of causing the alternative gift in favour of his wife and children to take effect, procured himself to be adjudicated bankrupt on his own petition. On March 16, 1895, the testator's widow died. The bankruptcy was annulled on April 4 on the ground of its being a device.

On January 30, 1895, an order was made on the further consideration of a suit for administration of the estate, by which Henry was ordered to pay the 5188*l.*, and it was declared that any interest coming to him under the will was liable to make it good, and that sum and the costs of the action which he was ordered to pay were declared a charge upon his interest, if any.

The question is whether under these circumstances the alternative gift to the wife and children of Henry has taken effect.

This limitation is not in any of the forms which use has rendered familiar. It does not contain any words referring to voluntary alienation. I am clearly of opinion that neither the mortgages made by Henry, nor his pretended bankruptcy, although existing at the death of the widow, which is the point of time referred to in the alternative limitation, caused the gift in favour of Henry's wife and children to take effect. The difficulty is to determine what was the consequence of his liability to pay to the trustees 5188*l.* and the order making this sum a charge upon his interest, if any. It was argued that this did create a legal disability in consequence whereof he was hindered in taking his share for his own personal and exclusive benefit. But does this create a legal disability? Legal disability must be a disability of the person referred to occasioned by act of law.

It was ingeniously argued that even without the order of the

C. A.

1896

In re
CAREW.CAREW
v.

CAREW.

Kay L.J.

C. A.
1896
~~~~~  
*In re*  
CAREW.  
CAREW  
v.  
CAREW.  
~~~~~  
Kay L.J.

Court there is a rule of law which prevented Henry from taking anything under the will until his liability to the estate as a trustee or executor was satisfied. That is quite true; but is that the legal disability contemplated by this clause? At any rate, it is urged that if that would not do, the order of the Court, which was made during the life of the tenant for life and remained unsatisfied at her death, created a disability by act of law.

I confess I think this question of the effect of Henry's indebtedness and of the order one of some difficulty. I agree that in order to arrive at a true solution of it the general intention and scheme of the will must be considered.

The best mode of putting the case for the appellants seems to me to be to treat disability as meaning disability of Henry to take for his own personal and exclusive benefit. If such disability is occasioned by act of law the alternative gift takes effect. Any proceeding in a court of law in invitum, although brought about by Henry's own act or default, it may be argued is a legal disability within the meaning of this provision.

But that would be reading the clause as though it were written, "If Henry is prevented from taking for his own benefit by the judgment or order of any Court, the property shall go to his wife and children."

The object of the testator does not seem to have been to prevent Henry from alienating or charging his interest. If a charge created by the act of the legatee was not to make the alternative limitation take effect, it is difficult to suppose that the testator intended that a charge imposed by a rule of law or by an order of the Court was to have that consequence. Moreover, if that was so, a judgment for a small amount—ten or five pounds—and execution unsatisfied at the time specified, would cause the property to go over. If that were the clear meaning of the words, of course, the Court must enforce it; but if it is doubtful, these considerations are important.

Then, further, in a case where the meaning is dubious, the consequence of either construction may and ought to be considered. If this property has gone over to Henry's wife and children, not only are all the charges made by him upon it

defeated, but Jessie will lose half of the 5188*l.*, which is her share of Henry's debt to the estate, and he will have had all that money beside what he has raised upon his share by mortgages, which, I understand, he cannot redeem.

If the limitation in favour of Henry's wife and children has not taken effect, Jessie will recover her full share of the estate, and there will be something for the mortgagees of Henry. His wife and other children will get nothing.

The latter of these two constructions will occasion less injustice than the other.

On the whole, I think the words "legal disability" mean a bankruptcy, or possibly a felony, some condition of the legatee in consequence of which the law deprives him of his property; not a mere charge created by judgment and execution, or imposed by a decree of a Court. Either of these he might get rid of by paying the amount, and in this respect a charge imposed by the judgment of a Court is no more a disability than a charge created by his own voluntary act.

For these reasons, I think that this appeal should be dismissed.

Solicitors: *Busk & Mellor*; *E. Vernor Miles*; *Rye & Eyre*; *E. H. Goddard*; *Mear & Fowler*; *Elgood & Moyle*; *Routh, Stacey & Castle*.

H. C. J.
W. W. K.

C. A.
1896
In re
CAREW.
CAREW
v.
CAREW.
Kay L.J.

C. A.

1896

VAUGHAN
WILLIAMS
J

Feb. 20.

C. A.

May 4.

In re LAND SECURITIES COMPANY.*Ex parte* FARQUHAR.*Company—Winding-up—Scheme of Arrangement—Prepayment of Calls—
“Discount.”*

In an ordinary commercial document the word “discount” means rebate of interest, and not “true” or mathematical discount :—

So *held*, by the Court of Appeal, in the case of a scheme for arrangement with the creditors of a company in course of liquidation by which an option was given to shareholders to prepay calls “under discount at the rate of 4 per cent. per annum.”

The decision of Vaughan Williams J. reversed.

APPEAL from Vaughan Williams J.

In the course of the liquidation of this company, and after a call of 10*l.* per share had been made by the liquidator upon the shareholders, a scheme of arrangement and compromise with the creditors of the company was sanctioned by the Court on December 18, 1894. By this scheme it was provided, amongst other things, (1.) that, in addition to the call already made, a call should be made upon the shareholders for the remainder of the uncalled capital, namely, 25*l.* per share; and (2.) that the liquidator should have power, with the consent of the committee of inspection, but without further leave of the Court, to postpone or remit any of the instalments, but so that no postponement or remission should be made to the shareholders except as a whole, and that subject to this power the calls so made should be payable (in effect) by quarterly instalments, all of which, except the final one of 1*l.*, were of 2*l.* each, spread over a period of rather more than four years, from August 2, 1894, to September 30, 1898. The 3rd clause of the scheme was as follows : “That an option be given to every shareholder to pay up the total calls, or any portion thereof, in the order of due date, under discount at the rate of 4 per cent. per annum, the instalments being taken as payable at the above dates.”

Mr. Alfred Farquhar was the owner, either in his own name or otherwise, of 3500 shares of 50*l.* each in the company, and in January, 1895, his liability for the calls to be paid by such

instalments was 25*l.* a share, and amounted to 87,500*l.* Hearing that calls were coming in somewhat slowly, Mr. Farquhar expressed his readiness to pay up his calls in full, and the liquidator, having made his calculations up to January 31, 1895, Mr. Farquhar on that day discharged his liability by a payment of over 80,000*l.* to the liquidator, being allowed 6709*l.* 15*s.* 10*d.* for "discount" under the 3rd clause of the scheme of arrangement. This payment was made by Mr. Farquhar on the assumption that the figures of the liquidator were correct, and that ordinary mercantile or banking discount had been allowed; but he afterwards ascertained that "true" or mathematical discount had been calculated, and that according to his view he had overpaid the liquidator to the extent of 652*l.* 12*s.* 11*d.* He then applied to the liquidator to refund that amount, and the liquidator in consequence took out a summons for directions as to the construction of clause 3 of the scheme of arrangement. This summons was adjourned into Court, and came on before Vaughan Williams J., sitting as an additional judge of the Chancery Division, on February 20, 1896.

According to the liquidator's evidence, Mr. Farquhar had calculated the discount at the rate of 4*l.* per cent. per annum on the total amount of the instalments as they became due in the same way as bankers would calculate discount on short dated bills, arriving at the sum of 7362*l.* 8*s.* 9*d.* as the total amount of the discount, whilst he (the liquidator) had calculated "true discount," that was to say, had allowed such sum as discount as would leave an amount which at 4 per cent. would produce the amount of the instalments of the call when they became due, and had thus arrived at the sum of 6709*l.* 15*s.* 10*d.*; the difference between the two calculations being 652*l.* 12*s.* 11*d.* To illustrate this, the liquidator stated that, according to Mr. Farquhar, discount at 4 per cent. on 100*l.* due at the end of three years would be 12*l.*; whereas, according to himself, it would be 10*l.* 14*s.* 3*d.*, inasmuch as 89*l.* 5*s.* 9*d.* with interest at 4 per cent. per annum would amount to 100*l.* in three years. The liquidator also stated that the rate of rebate was put at 4 per cent. because the debentures

C. A.
1896
In re
LAND
SECURITIES
COMPANY.
Ex parte
FARQUHAR.

C. A.
1896
In re
LAND
SECURITIES
COMPANY.
Ex parte
FARQUHAR.

for the repayment of which the uncalled for capital was under the scheme available bore interest at an average of 4 per cent., and the discount was allowed because the interest running on the debentures would to that extent be saved by the prepayment of the instalments of unpaid capital.

Mr. Farquhar, who was a banker of twenty-two years' experience, in his evidence stated that it was not the practice of bankers to calculate what might be described as "mercantile discount" only upon short dated bills, but that discount on a bill in a banking or mercantile sense was simple interest paid in advance upon the note or bill calculated on the period of time between the date on which the discount was deducted and that at which the bill matured; and that this was the rule adopted by bankers whatever the duration of the bill, and, further, was the method of calculation adopted by the Inland Revenue in arriving at the discount to be deducted on duty paid in advance under the Succession Duty Act, 1853, s. 40, and universally recognised as applicable where the term "discount" was used in business transactions.

A. R. Kirby, for the liquidator, in support of the summons.
Younger, for Mr. Farquhar, contra.

VAUGHAN WILLIAMS J. came to the conclusion that "discount" in clause 3 of the scheme of arrangement was an equivocal word which might mean either commercial discount or true discount; that *prima facie* he ought to put the meaning on it which was most favourable to the creditor; and, further, that he was bound to assume that all parties to the bargain intended that the individual members of each class should be dealt with on an equality; and he accordingly construed the word "discount" in the scheme to mean true discount, according to the contention of the liquidator.

C. A. Mr. Farquhar appealed, and the appeal came on for hearing on May 4.

Younger, for the appellant. The learned judge seems to have felt constrained to decide in favour of what the liquidator

calls "true discount" by the consideration that he ought to put on the word "discount" the meaning most favourable for the creditors and that most likely to place the shareholders on an equal footing. But this particular clause was not introduced for the benefit of the creditors, or to produce equality between the shareholders. It was inserted in the interest of the liquidator, in order to induce shareholders, whose means permitted it, to make prompt payment to the general advantage of the liquidation. "True discount" may be something more scientifically accurate than that which is called discount in ordinary parlance by commercial men and the public generally; but counsel in the Court below did not point to any instance in which "discount" had been held to mean true discount. There is no authority in the reports on the subject, but there is no doubt that the usual meaning of the word is rebate of interest. "In the commercial world it is customary to take for the discount the interest for the sum for the time that elapses till it becomes due": Jones on the Value of Annuities, 1844. If it had been intended that present value should be taken as the basis of the calculation, the rate of 4 per cent. would not have been adopted. [He also referred for the definition of discount to the Century Dictionary, the English Encyclopædia (1860), the New American Dictionary (1861), 7 Geo. 1, c. 31, s. 1, and the Succession Duty Act, 1853, s. 40.]

A. R. Kirby, for the liquidator. "Discount" has a meaning different from interest. In Wharton's Law Lexicon, 3rd ed. tit. Discount, it is stated: "The usual method of allowing discount, by deducting from the amount of the debt the interest which it would produce at the given rate during the given time, is inaccurate. The true discount for any given sum, for any given time, is such a sum as would, if put out at interest in that time, amount to the interest of the sum to be discounted."

I admit that bankers do, under the name of discount, charge a rebate of interest. In trade a discount is a sum thrown off at the moment, and such discount may mean an abatement of any kind whatever. But apart from that, in the case of discount for a period of time at so much per cent. per annum,

C. A.

1896

In re
LAND
SECURITIES
COMPANY.

Ex parte
FARQUHAR.

C. A.

1896

In re

LAND
SECURITIES
COMPANY.Ex parte
FARQUHAR.

discount means true discount, and should be calculated accordingly.

“When money due at the expiration of a certain period is discharged by the payment of an immediate sum, the party making it ought not to pay the whole sum, but that portion of it which, put out at interest, will amount at the expiration of the period to the sum due”: Jones on the Value of Annuities.

No reply was called for.

LINDLEY L.J. The point before us is a very simple one, but, like many other simple points, is not so easy of solution as it is easy of statement. We have to consider a clause in a scheme of arrangement between the debenture-holders and the creditors of the Lands Securities Company. It appears that the Land Securities Company was in such a state of indebtedness that very heavy calls had to be made, and a scheme of arrangement was come to, the important portions of which I will read.

[His Lordship then stated the facts of the case, and the contention on either side, and, after reading clause 3 of the scheme of arrangement, continued:—]

Now, it appears to me that this expression “under discount at the rate of 4 per cent.” is open to some little ambiguity. It may mean either simple rebate of interest or what is called true discount—i.e., discount based on present value. The question is, What would any ordinary business man understand by this scheme? I apprehend that whatever would be the meaning put upon it by ordinary business people is the true meaning to be put upon it. Now, it strikes me, I confess, that any ordinary business man—any person accustomed to deal with companies, or anything of that kind—would understand the expression “under discount at 4 per cent.” in the ordinary commercial sense—that is to say, as meaning, “I shall pay you the amount less 4 per cent. interest,” and his mind would not run on the present value. On the other hand, I agree that the mind of an actuary of an insurance company would run upon present value, and nothing else. I have no doubt that an actuary of an insurance company would adopt the calculation which the

liquidator has adopted here. But when you look at the form of this clause 3, and the rate of 4 per cent., and when you bear in mind that 4 per cent. per annum cannot easily be made—at all events, by investment—it strikes me that a person reading this clause would be led off the consideration of the present value, and would be led on to the ordinary business meaning of the phrase. Vaughan Williams J. seems to admit that; but then he says he thinks that mode of calculation would produce an unfair inequality between those who can pay and avail themselves of this option, and those who cannot. But it is obvious that this option was held out to the shareholders as an inducement to them to pay earlier. The liquidator's position is this. There were debentures bearing interest on the average at 4 per cent. per annum, and I do not doubt that it would be better for the debenture-holders that this discount should be calculated on the present value theory rather than on the rebate theory. But we must come back to the question, What would an ordinary business man understand by these words? I cannot think that the supposed inequality is a sufficient justification for departing from the meaning which any such person would put upon them. I must say that I think that the rebate principle is the correct one. I think that any business person reading this document, and coming to this arrangement upon these terms, would so understand it; and I think that is the true construction of the document, and the one which we ought to abide by. I think, therefore, Vaughan Williams J. was wrong in this matter, and that his first impression was the right one. The *appel* must therefore be allowed.

LOPES L.J. I am of the same opinion. The question is, what is the meaning in clause 3 of the words “under discount at the rate of 4 per cent. per annum”? The liquidator says it is to be calculated on the present value. On the other hand, it is said by Mr. Farquhar, who is, no doubt, very much interested in the matter, that it must be taken on the commercial value. Now, what would really be the understanding of ordinary persons in business who came into contact with this clause 3? In my judgment, there is not one in a hundred who would

C. A.

1896

In reLAND
SECURITIES
COMPANY.*Ex parte*
FARQUHAR.

Lindley L.J.

C. A.
 1896
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*In re*  
 LAND  
 SECURITIES  
 COMPANY.  
*Ex parte*  
 FARQUHAR.  
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 Lopes L.J.

come to any other conclusion except that the word "discount" in clause 3 really meant a rebate of 4 per cent. for early payment. Of course the early payment was the inducement held out, and the shareholders would understand by this that if they made this early payment they would have a rebate of 4 per cent. per annum. As was observed during the argument, if it was intended to be calculated on the present value, 4 per cent. per annum could not be the rate of the present value, and there would be an inconsistency in the very terms of the clause. I am strongly of opinion that the proper mode of construing these words is to attribute to them the meaning of a rebate at the rate of 4 per cent. per annum, and I am unable, therefore, to agree with the conclusion at which Vaughan Williams J. has arrived.

KAY L.J. This document embodying the scheme which the Court has approved is essentially a commercial document; and the question is what, in a commercial document of this kind, is the meaning of "under discount at the rate of 4 per cent. per annum"? The scheme provides for the payment of 25*l.* per share by instalments, which are to be paid every three months, and to extend over four years altogether. Then it provides that any shareholder may, if he likes, pay the amount due on his shares in advance "under discount at the rate of 4 per cent. per annum." Now, what is the ordinary commercial meaning of those words? I entirely agree that, in a document of this kind, the meaning of those words is that, and that only, which an ordinary commercial man on reading it would be likely to attribute to them. I confess I come to the conclusion, without a doubt, that the ordinary commercial meaning of these words is this: "If you pay me that which is due from you in advance you shall have a rebate at the rate of 4 per cent. per annum for that payment in advance."

The learned judge says at the commencement of his judgment: "It is quite true, and I have been very much impressed with that, that commercially the almost invariable use of the word 'discount' is as meaning commercial discount, that is a rebate of interest. . . . But I am bound to come to the con-

clusion that 'discount' is an equivocal word which may mean commercial discount, or may mean true discount. The question is which it means here. . . . It seems to me that *primâ facie* if the word is capable of two meanings I ought to put the meaning upon it which is most favourable to the creditors and not that which is most favourable to the shareholders. I only say *primâ facie*, because the popular use of a word may be so well known and so recognised that notwithstanding that it is theoretically true that 'discount' is equivocal, yet I ought to construe the word according to its popular meaning. I think that, if I only had to decide the matter upon that basis, I should be disposed to decide that this was commercial discount, notwithstanding the general rule that an offer of this sort when accepted by the creditors ought to be construed in their favour in case of doubt, rather than in favour of the shareholders who have entered into the scheme."

I really cannot follow that. I cannot understand on what possible ground there should be any bias in favour of the creditors and against the shareholders. The question is, what is the meaning of the document? Why are we, if there be a case of ambiguity, to lean in favour of one side more than the other? I adopt entirely that which the learned judge says, that the *primâ facie* meaning of these words is a rebate such as I have described. This is a document addressed to commercial men, and that is the commercial meaning, and that which the persons to whom it is addressed would *primâ facie* understand to be the meaning of those words is, unless there is something to alter it in the context, the meaning the Court ought to attribute to them. So far, therefore, I venture to agree with the judgment of the learned judge; but then he goes on and gives his reason; and, as I understand it, the convincing reason with the learned judge was that it was the obvious intention that each shareholder should pay the present value of his call, and that if he was made to pay anything else, there would be an inequality between the shareholders who can pay in advance and those who cannot pay in advance. I understand that, and I should see the force of it if this document did provide for the present value on either construction. But it does not. It

C. A.
1896
In re
LAND
SECURITIES
COMPANY.
Ex parte
FARQUHAR.
Kay L.J.

C. A.

1896

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*In re*LAND  
SECURITIES  
COMPANY.*Ex parte*  
FARQUHAR.~~~~~  
Kay L.J.

provides for the payment in advance "under discount at the rate of 4 per cent. per annum." This was in the year 1894, and 4 per cent. was not the value of money at that time. Therefore the scheme did not contemplate paying the present value at that time of the calls which the shareholders had to pay; and there goes at once the main reason upon which this judgment of the learned judge seems to have been founded. I therefore, with great deference, dissent entirely from his decision. I do not think this is a case in which the construction ought to have any bias either in favour of the creditors or in favour of the shareholders. The question is, what is the real meaning of these words addressed to commercial men? I think the real meaning is that which I have indicated—a rebate of interest; and I think the other reason which the learned judge gives, when it is examined, does not exist at all, and an attempt to support the judgment on that ground would be, in my opinion, an utter fallacy. I think, therefore, that this decision must be reversed, and the appeal be allowed.

Solicitors: *Rose & Johnson; Ashurst, Morris, Crisp & Co.*

W. W. K.

C. A.

1896

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May 4, 5.

In re STUART AND OLIVANT AND SEADON'S
CONTRACT.

Vendor and Purchaser—Document of Title missing—Expense of Searching for Documents not in Vendor's Possession—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 6.

Unless the contract for sale contains provisions inconsistent with s. 3, sub-s. 6, of the Conveyancing Act of 1881, the expense of searching for all documents not in the vendor's possession and required by the purchaser for the purpose of verifying the abstract, not excepting even the deed (e.g., an underlease), which is the root of the vendor's title, must be borne by the purchaser.

The decision of Stirling J. affirmed.

APPEAL from Stirling J.

On November 22, 1895, Charles Seadon agreed to purchase a leasehold messuage, No. 183, Grove Road, Bethnal Green,

for the sum of 195*l.* from William Campbell Stuart and G. D. Starkey Olivant (who were selling as the executors of a deceased mortgagee). The contract was entered into under particulars and conditions of sale which had been prepared for the purpose of selling No. 183, Grove Road and another house in lots, and No. 183 was to have formed Lot 1. Of these conditions clause 5 was as follows:—

C. A.

1896

In re

STUART AND
OLIVANT AND
SEADON'S
CONTRACT.

“The title to the several lots shall commence with the leases under which the same are respectively held for the terms mentioned in the particulars. No objection shall be taken on the ground that the two leases mentioned in the particulars are underleases, or on the ground that other properties are comprised in the original leases out of which the several terms mentioned in the particulars were granted.”

The vendors duly delivered their abstract of title, and it commenced with an indenture of underlease dated October 13, 1865, which was an underlease of the messuage No. 183, Grove Road, together with two other properties, and was the root of the vendors' title.

The purchaser then made the following amongst other requisitions: “In whose possession is the underlease of the 13th of October, 1865, and where can it be inspected? Have the vendors an attested or other copy thereof? If so, it should be handed over on completion.” The vendors had not got this underlease, but only an attested copy of it, with the benefit of a covenant for the production of the original, and they answered the requisition as follows: “An attested copy will be produced on completion.”

The purchaser replied, “The information asked for in the first part of this requisition should be ascertained and furnished to the purchaser.” Correspondence and negotiation then ensued between the parties. The vendors stated that the underlease, which comprised other property, was not in their possession, and that they did not know in whose possession it was; that they were prepared to make further search for the purpose of ascertaining in whose possession it was, but that the case fell within s. 3, sub-s. 6, of the Conveyancing Act, 1881, and that the expense of such search must be borne by the purchaser.

C. A.

1896

In reSTUART AND
OLIVANT AND
SEADON'S
CONTRACT.

The purchaser maintained that there was nothing in the particulars or conditions to shew that the underlease was not in the vendor's possession, or that there was any difficulty in obtaining inspection of it, and that the vendors were not relieved from the obligation of furnishing the required information at their own expense. And ultimately the purchaser took out the present summons against the vendors under the Vendor and Purchaser Act, 1874, asking for a declaration that a good title had not been shewn to the property which was the subject of the contract, in accordance with the conditions of sale, by reason of the respondents' refusal to furnish the purchaser, save at his own expense, with any information as to the whereabouts of the underlease, which was the root of title to the property under the conditions of sale.

The summons came on before Stirling J., and his Lordship on March 10 decided that the purchaser was not entitled to the declaration which he asked.

The purchaser appealed.

Swinfen Eady, Q.C., and *Stewart-Smith*, for the appellant. If the contention of the vendors is well founded, all that a vendor has to do is to produce a good paper title. Here the vendors have delivered an abstract shewing that their title commences with a particular deed; but when asked to tell the purchaser where this deed is, so that he can inspect it, they say that they have not got the deed in their possession and do not know where it is, but that they will try to find out at the purchaser's expense; and they say this notwithstanding that they have a covenant for production, and that they have neither protected themselves by special condition, nor have given the purchaser any indication that they have not got their own root of title in their possession, or that there was any difficulty as to inspecting it. Under the law prior to the Act of 1881 this contention would be untenable; but it is said that sub-s. 6 of s. 3 of that Act enables them to throw upon the purchasers the expense of finding out where their own root of title is. That sub-section, however, only throws upon purchasers the expense of producing deeds, and not the expense of finding out where

they are: *In re Johnson and Tustin* (1); *In re Moody and Yates' Contract* (2); *In re Willett and Argenti* (3); *Reeve v. Berridge*. (4) The old law is not altered to the extent that a vendor is no longer bound to know where his title-deeds are. Here we might be put to great expense without perhaps getting what we want.

C. A.
1896
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*In re*  
STUART AND  
OLIVANT AND  
SEADON'S  
CONTRACT.

Sect. 3, sub-s. 6 (5), as to expenses on the sale of a property, is divisible into two branches. The first deals with the expenses of "the production and inspection of all Acts of Parliament, inclosure awards," and other things mentioned therein, comprising "deeds, and other documents not in the vendor's possession." The second deals with the expenses of "searching for," &c., certain other things not included in the first branch, namely, "certificates, declarations, evidences, and information not in the vendor's possession." The only way of throwing this expense upon the purchaser is by treating it as the expense of obtaining "information"; but the word "information" in the latter branch must be treated as referring to things ejusdem generis, and cannot be taken as referring to the "deeds" and other things enumerated in the former branch. And accordingly the expense of searching for deeds is not thrown upon the purchaser. [They also referred to Sugden's Vendors and Purchasers, 14th ed. p. 429; Dart's Vendors and Purchasers, 6th ed. p. 471; Wolstenholme on the Conveyancing and Settled Land Acts, 7th ed. p. 22.]

(1) 28 Ch. D. 84; 30 Ch. D. 42.

(2) 30 Ch. D. 344.

(3) W. N. (1889) 66.

(4) 20 Q. B. D. 523.

(5) Sect. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, provides as follows:—

"On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection,

and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same."

C. A. *Elgood*, for the respondents, was not called on.

1896

*In re*

STUART AND  
OLIVANT AND  
SEADON'S  
CONTRACT.

LINDLEY L.J. The object of sub-s. 6 of s. 3 of the Conveyancing and Law of Property Act, 1881, was to check an abuse which was well known to exist in many cases. Whether in doing that the Legislature has gone a little too far, and has imposed onerous terms on the purchaser, is another matter. I think it has. But what we have to do now is to construe this section, and to apply it fairly and properly to the case before us.

The case is this. The vendors had a house in Bethnal Green which they put up for sale. Their title commenced, according to the abstract, with a certain underlease dated October 13, 1865, and it appears that they had not got that underlease in their possession. It included other property, and what they had got themselves was an attested copy of it, and a right to have its production under a covenant to the benefit of which they were entitled. Something of that kind is shadowed forth in the 5th clause of the conditions of sale. [His Lordship then read that clause, and continued :—]

There is nothing there to shew to an intending purchaser that the vendor had not got the underlease with which he proposed to start the abstract, and nothing to shew to the purchaser that there was any difficulty about seeing it or getting it.

The question is whether the expense of ascertaining where the original underlease is should fall on the vendors or the purchaser. The contract says nothing about it, and we have to consider sub-s. 6 of s. 3 of the Conveyancing and Law of Property Act, 1881. [His Lordship then read that sub-section, and resumed :—]

What strikes me on reading this sub-section is that it deals only with expenses. It does not deal with the duty of making out titles, or relieve vendors from the duty of making out good titles. And accordingly it was held in *In re Johnson and Tustin* (1) that a vendor was bound at his own expense to supply a complete and proper abstract, and must pay the costs

(1) 28 Ch. D. 84; 30 Ch. D. 42.

of it; and it was also held in *In re Moody and Yates' Contract* (1) that on a sale of leaseholds a vendor must bear the costs of a surveyor's report which had to be given for the satisfaction of the ground landlord. But here we have nothing of that kind to deal with. We have to deal with that to which the section is addressed, namely, the mere question of expenses. I cannot get over the language of this section. It appears to me to have thrown the expenses on the purchaser, in a case like this, in language too plain to escape from.

It was suggested by Mr. Swinfen Eady and Mr. Stewart-Smith, in their very ingenious argument, that the clause which begins, "The expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession," cannot refer to such things as Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls and deeds, and so on, mentioned in the first clause of the sub-section. I cannot go that length. It appears to me that the effect of so reading the sub-section would be to cut down the language to an extent we are not justified in doing upon any principle of construction. I think the case is a hard one; but I cannot help that. I think Stirling J. has taken the only view possible, and that the appeal must be dismissed.

LOPES L.J. I am of the same opinion. I must say, if I could have found it possible, I should have liked to relieve the purchaser from the expense sought to be cast on him; but I do not see my way to do so. It is to be observed that this sub-section has nothing to do with production. The vendor is not relieved from production in any respect. The sub-section only deals with expense. I suppose the object of this section must have been to relieve the vendor from vexatious requisitions, and it has probably gone a little further than was requisite. On that account it may possibly lead to mischief; for it seems to me that a vendor, in a case like this, could easily protect himself from all expense. He has only to sell on an open contract, and in that way cast upon the purchaser expenses

C. A.

1896

*In re*STUART AND  
OLIVANT AND  
SEADON'S  
CONTRACT.

Lindley L.J.

C. A.

1896

*In re*STUART AND  
OLIVANT AND  
SEADON'S  
CONTRACT.

Lopes L.J.

which it is certainly unjust that he should bear. However, there is the Act of Parliament, and we must follow it. When carefully read, it appears to me to cover a case like this; and I do not feel that I can give effect to the ingenious argument which has been addressed to us, by which it was said that the effect sought to be put on it might be avoided. In my opinion, Stirling J. has taken the right view, and the appeal must be dismissed with costs.

KAY L.J. The question is whether the vendors have a right to insist that the purchaser should pay the expense of obtaining information where the underlease is. Before the Conveyancing Act of 1881 there would have been no question. It clearly would have been the duty of the vendors to obtain the information at their own expense, because it was information necessary to enable the purchaser to verify the abstract of title; and it would have been the vendor's duty to give the purchaser every facility for doing that. No doubt it happened very often, before this Act was passed, that all manner of useless and minute requisitions were made which put vendors to considerable expense, and this Act of Parliament was passed for the purpose of checking that, and throwing the expense of obtaining information (amongst other things) upon the purchaser. I confess that this case seems to me an uncommonly hard one. The purchaser's contention is that the underlease is the very root of the title which has been abstracted and furnished to him, and that for anything he knows it may be in the possession of a mortgagee. He does not ask for production; but he wants to know where it is. The vendors say that they do not know, but that if they find out for him he must pay the expense. I think that is very hard; but, having regard to the Act, I do not see any possibility of escape for the purchaser. [His Lordship then stated the sub-section, and continued:—]

The word "information" is as large as can be. An attempt is made to limit the meaning of it by the words associated with it; and it is argued that the words "the expenses of searching for all certificates, declarations, evidences, and information not in the vendor's possession" shew that the general meaning of



the word "information" is limited to something like certificates, declarations, and evidences. But it is obvious that it cannot be so. Take the case of the certificate of a birth, death, or marriage, which is a chain in the title; the certificate is not information. It is the evidence of that fact. So, too, a declaration, by which, I suppose, is meant a statutory declaration of some fact also in the chain of title stated in the abstract. That declaration is not information. The next word, "evidences," again, is not information; and the language is not "all certificates, declarations, evidences, *or* other information." Nor, indeed, is it "certificates, declarations, evidences, *or* information." It is "certificates, declarations, evidences, *and* information." Information there means something different essentially from certificates, declarations, or evidences. Therefore, in reading the sub-section for the present purpose, those words must be left out, because the association of them does not limit the meaning of the word "information," and it will then read: "the expenses of searching for, procuring, making, verifying, and producing all information not in the vendor's possession shall be paid by the purchaser." I am very sorry to have so to hold, and I would escape the words if I could, because I think they produce hardship. It looks to me as if a vendor might not have any one of his title-deeds in his possession; he need not disclose that fact; he need not make any condition in the agreement throwing the expense of ascertaining where they are upon the purchaser; but when the purchaser asks him where they are he may safely answer, "I do not know, and if you want to know I will find out at your expense." I confess I think if the Legislature had carefully considered what they were doing, they would not have made the section quite so wide. However, there it is, and we have only to construe it; and I cannot construe it to make it not apply to this particular case before us. I think the appeal must be dismissed.

Solicitors: *J. H. Smith; Layton, Sons & London.*

W. W. K.

C. A.

1896

*In re*

STUART AND  
OLIVANT AND  
SEADON'S  
CONTRACT.

Kay L.J.

C. A.

*In re* WATKINS.1896May 18, 19.

*Lunacy*—Person “lawfully detained”—*English Person lawfully detained abroad*  
—*Lunacy Act, 1890* (53 & 54 *Vict. c. 5*), s. 116, sub-s. 1, cl. (c).

The expression “lawfully detained as a lunatic though not so found by inquisition,” as used in s. 116, sub-s. 1, cl. (c), of the Lunacy Act, 1890, means “lawfully detained” under the provisions of that Act, i.e., within the jurisdiction; and does not apply to an Englishman detained in a foreign country in accordance with the laws of that country.

MISS F. L. WATKINS, a young lady of unsound mind, though not found lunatic by inquisition, was detained as a lunatic in Belgium in accordance with the laws of that country.

This was an application by her father that he, or some other proper person, might be appointed receiver of her estate and effects, and that direction might be given for bringing her within the jurisdiction, and as to her future residence, and that the person so to be appointed might be authorized to receive and give a discharge for all rents and income of any property belonging to her. Upon the hearing of the application before the master he was of opinion that “unlawfully detained” meant detained under the powers of the Acts of Parliament of this country (1) relating to lunacy; and, as the application was a novel one and there was no precedent for the order applied for, the matter was now brought before the Court.

*Ingle Joyce*, for the applicant. The laws of Belgium have been complied with in regard to the detention in Brussels of this young lady as a lunatic, and the only question is whether under such circumstances she is a person “lawfully detained” as a lunatic though not so found by inquisition, within the meaning of s. 116, sub-s. 1, cl. (c) of the Lunacy Act, 1890. I submit that she is “lawfully detained,” and that the Court has jurisdiction to make the order.

*Cur. adv. vult.*

(1) The Act of 1890 does not extend to Scotland or Ireland save as expressly provided: see s. 2.

May 19. LINDLEY L.J. In this case the question is whether we can make an order appointing the father of a young lady, who is a lunatic and detained in Belgium by the law of that country, to receive the income of her property. The question turns upon the construction of s. 116, sub-s. 1, clause (c) of the Lunacy Act, 1890. That section says: “(1.) The powers and provisions of this part of this Act relating to management and administration apply”—among others, to—“(c) every person lawfully detained as a lunatic though not so found by inquisition.” It is said that this young lady is lawfully detained as a lunatic although she is not so found by inquisition. That is true enough, and in one sense she is lawfully detained—that is to say, she is lawfully detained in Belgium as a lunatic, and the law of Belgium has been complied with. But a difficulty is suggested by the masters and officers of the Lunacy Department, which is this, that, not only is there no precedent for making the order under this section, but that, upon the true construction of the Act of Parliament, the expression “lawfully detained as a lunatic” means lawfully detained as a lunatic under the powers of this Act of Parliament. I have taken the opportunity afforded me by the adjournment of looking through the whole of the Act, which is a long one, and I have come to the conclusion that the view taken by the masters and officers is right, and that by the expression “lawfully detained as a lunatic” is really meant lawfully detained under the provisions of the Acts of Parliament of this country, and not by the law of some other country.

Now the law as to detention is to be found in Part I. of the Act of 1890; and it is impossible, I think, to read through that part of the Act, and especially ss. 4 and 9, and those which relate to urgency orders and summary reception orders and reception orders by two commissioners, without seeing that, in that part, “lawfully detained” means lawfully detained under the powers conferred by the Act of Parliament. Again, when you look at ss. 72, 75, and 76, relating to the discharge of lunatics, where the same expression is used, the same remark applies. Then there are, in addition to that, Parts VI. and VII., which

C. A.

1896

*In re*  
WATKINS.

C. A.  
1896  
*In re*  
WATKINS.  
Lindley L.J.

relate to the visitation of lunatics ; Part VIII., which relates to licensed houses and hospitals ; Part IX., which relates to asylums ; s. 315, which refers to unlawful detention ; and s. 331, which relates to actions for unlawful detention. The expression “lawfully detained” there can only mean lawfully detained under the provisions of this Act of Parliament. Therefore, it appears to me, on the true construction of the whole Act, we are bound to come to the conclusion that we have no jurisdiction to make this order at this time.

There are two methods of getting out of the difficulty : one is to have this young lady found lunatic by inquisition, which can be done ; and the other is to bring her over here, where she will be lawfully detained under this Act. While she is abroad we cannot do it. We therefore will make no order ; but, if she can be brought over here, the present application may stand over, and all the evidence which has been used may be used again.

LOPES L.J. After considering the different provisions of this Act, and having had an opportunity of talking it over with my brothers, I have come to the same conclusion as that which has just been expressed by the Lord Justice Lindley.

I am of opinion that “lawfully detained,” as used in clause (c), sub-s. 1 of s. 116, is lawfully detained under the provisions of this Act—that is, lawfully detained within the jurisdiction. The lunatic in this case is lawfully detained in Belgium ; and, therefore, the case does not come within the meaning of this clause (c). There may be a certain amount of inconvenience about that ; but I am reconciled to the view which has been expressed, and which I believe to be the right one, by the fact that there are modes of overcoming the difficulty caused by that construction. There are two modes : one by bringing the lunatic within the jurisdiction, and the other by proceeding by inquiry and obtaining a finding upon an inquisition. I am unable to resist what I believe to be the true construction of the Act, namely, that “lawfully detained” means lawfully detained under the powers of this Act—that is, within the jurisdiction.



RIGBY L.J. I am of the same opinion, and for the same reasons. I do not arrive at this conclusion without some regret; but we ought not to overstep our jurisdiction because we think that in this case, and perhaps in similar cases generally, it might be advantageous so to do.

C. A.

1896

In reWATKINS.  

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Solicitors : *Ingle, Holmes & Sons.*

W. W. K.

CHITTY J.

JACKSON v. RAINFORD COAL COMPANY.

1896

June 11.

[1896 J. 944.]

*Company—Borrowing Powers—Uncalled Capital—Charging uncalled Capital—Sufficient Authority—Articles of Association—Alteration by Special Resolution.*

The articles of association authorized the company to borrow upon mortgage of its freehold and leasehold hereditaments, works, and “other property and effects” for the time being of the company, or upon bonds or debenture notes of the company, or “in such other manner as the company may determine.” The memorandum of association contained no reference to any borrowing:—

*Held*, that the company could under its articles mortgage its uncalled capital; and that, had it been necessary so to do, the company could by special resolution have extended its articles so as to confer upon itself the power to charge its uncalled capital.

*Newton v. Anglo-Australian Investment, Finance, and Land Co.* ([1895] A. C. 244) discussed and followed.

#### MOTION.

This was an application by two shareholders for an interim injunction to restrain the company from pledging or attempting to pledge its uncalled capital, or from passing any resolution authorizing them so to do.

The company was incorporated, under the Companies Act, 1862, in August, 1866, with the object among other things of carrying on the Rainford Colliery. The capital of the company was 100,000*l.*, divided into 100 shares of 1000*l.* each: 85 shares had been issued, 60 being fully paid up: of the remaining 25 shares 850*l.* per share had been called up, leaving a balance of uncalled capital of 3750*l.*

The memorandum of association contained no reference to borrowing, but by its articles of association (art. 56) the company was empowered at an extraordinary general meeting, by a resolution to be passed by a majority of at least two-thirds in number of votes and value of shares, and confirmed at a subsequent meeting by a similar majority, “To borrow, from time to time, at interest upon mortgage of the freehold, copyhold, and leasehold hereditaments, machinery, works, and other pro-

perty and effects for the time being of the company, or any of them, or any part thereof respectively, or upon bonds or debenture notes of the company, or in such other manner as the company may determine, such sum or sums of money at such rate or respective rates of interest, and repayable at such time or respective times, and upon and subject to such terms and conditions as the company shall from time to time think proper."

CHITTY J.  
1896  
JACKSON  
v.  
RAINFORD  
COAL  
COMPANY.

The company now proposed to pass a special resolution to enable it to mortgage all or any part of its uncalled capital.

*Macnaghten*, for the plaintiffs. What the company proposes to do is ultra vires and outside the scope of its memorandum and articles of association. The memorandum makes no reference to borrowing, and then art. 56 defines and limits the power.

[CHITTY J. referred to *Harrison v. Mexican Ry. Co.* (1)]

The words in art. 56, "other property and effects," will not include uncalled capital, and the words "in such other manner as the company may determine" carry the power no further: they only refer to the preceding words, bonds or debenture notes, and point to the manner of borrowing rather than to the property to be included in the charge. In *Stanley's Case* (2) the words were, on the security of "the funds or property" of the company, and they were held insufficient to authorize a charge on uncalled capital; and in *In re Sankey Brook Coal Co.* (3) power to pledge the "works, hereditaments, plant, property and effects" of the company were held insufficient. In *In re Phoenix Bessemer Steel Co.* (4) it is expressly stated that the words "upon mortgage or charge of any property of the company" would not of themselves authorize a mortgage of future calls. These authorities are all discussed in *Newton v. Anglo-Australian Investment, Finance, and Land Co.* (5) The memorandum and articles of association together constitute a bargain between the shareholders which it is not possible to alter.

(1) L. R. 19 Eq. 358.

(3) L. R. 10 Eq. 381.

(2) 4 D. J. & S. 407.

(4) 44 L. J. (Ch.) 683.

(5) [1895] A. C. 244.

CHITTY J. [CHITTY J. In *Newton's Case* (1) the Privy Council seem to have considered that a special resolution altering the articles and authorizing the borrowing on uncalled capital was good.]

1896  
JACKSON  
v.  
RAINFORD  
COAL  
COMPANY.

In that case there was no original article, as here, limiting or defining the borrowing powers.

*Sheldon*, for the company. The word "effects" includes "rights," including the right to call up capital, and this would authorize a charge on uncalled capital: *Howard v. Patent Ivory Manufacturing Co.* (2) I admit that *In re Sankey Brook Coal Co.* (3) and *Stanley's Case* (4) are against me; but the effect of these decisions has been cut down by *Newton's Case* (1), which practically overrules *Stanley's Case*. (4) Article 56 must be read as a whole: "in such other manner as the company may determine" are words wide enough to authorize a charge on uncalled capital. These words refer to borrowing generally, and are not to be confined to bonds or debentures, as suggested by the plaintiffs. The power is in general terms, "in such manner," and, therefore, upon such security as the company think best.

*Macnaghten*, in reply.

CHITTY J. The motion raises two points: first, whether the company, as the articles now stand, has power to raise money by a charge on its uncalled capital; and, secondly, assuming that it now has no such power, whether the company could by a special resolution confer upon itself such power.

On the second point I entertain no doubt whatever. The memorandum is silent on the question of borrowing, and if it had not been for the articles the company would, as a trading company, have power to borrow upon any security. But there is an article defining the power to borrow, and it is contended that this article limits the power so as not to authorize the borrowing in the manner now contemplated. On this point I entirely adopt what was said in *Newton v. Anglo-Australian Investment, Finance, and Land Co.* (1), in the judgment delivered by Lord Macnaghten. This is not a case of altering

(1) [1895] A. C. 244.

(2) 38 Ch. D. 156.

(3) L. R. 10 Eq. 381.

(4) 4 D. J. & S. 407.



any bargain made between classes of shareholders, or of taking away any rights which have been conferred by existing articles on other classes of shareholders, such as a right to preferential dividends or the like. But seeing that the memorandum is silent as to borrowing, and that in the articles there is a special power to borrow, I see no reason why the Companies Acts should not apply, and the company be justified in extending their articles for the purpose now required, if that be necessary. In *Newton v. Anglo-Australian Investment, Finance, and Land Co.* (1) the articles of association had been altered by special resolution, and the decision turned on the special resolution. Whether in that case there was or was not any article in the original articles in reference to borrowing, or defining the borrowing power, does not appear from the report; but this would seem from their Lordships' judgment to be quite immaterial. The passage I refer to is (2): "The articles of association as altered by special resolution contemplate and provide for such a charge. A regulation made by special resolution is of the same validity as if it had been originally contained in the articles of association." In my opinion, with regard to this second question the company has power, by special resolution, to alter its articles so as to cure a defect, if there be any in its existing articles as to borrowing powers.

Then I have to consider the present state of things, and whether as the articles now stand the borrowing power is limited so that the contemplated charge would not be justified. The first part of the article defining the borrowing power authorizes the company "to borrow from time to time at interest upon mortgage of the freehold, copyhold, and leasehold hereditaments, machinery, works, and other property and effects for the time being of the company, or any of them, or any part thereof respectively." I stay there to say that, having regard to *Stanley's Case* (3), and that of *In re Sankey Brook Coal Co.* (4), those words are not sufficient to justify a charge upon uncalled capital. Observations have been made upon *Stanley's Case* (3); but it has not been overruled, and these decisions are binding

CHITTY J.

1896

JACKSON

v.

RAINFORD  
COAL  
COMPANY.

(1) [1895] A. C. 244.

(2) Ibid. 248.

(3) 4 D. J. &amp; S. 407.

(4) L. R. 10 Eq. 381.

CHITTY J. on me. Then I proceed to read the rest of the clause: "or upon bonds or debenture notes of the company, or in such other manner as the company may determine, such sum or sums of money at such rate or respective rates of interest, and repayable at such time or respective times, and upon and subject to such terms and conditions as the company shall from time to time think proper."

1896  
JACKSON  
v.  
RAINFORD  
COAL  
COMPANY.  
—

This contains in point of form two other alternatives: first, power to borrow on bonds or debenture notes. This is general, and does not import in its widest sense any charge on any property, because bonds might be given without any security being added; so might debentures or debenture notes. The expression "debenture notes" has no special meaning, and I do not see that there can be any wide distinction made between debentures and debenture notes. Then there is another alternative—"or in such other manner as the company may determine."

No doubt the right mode of construing this clause is to consider the three parts of it separately up to a certain point, and then together as a whole. In the case in the Privy Council the words were, "to receive money on loan or deposit or otherwise, and upon any security of the company, or upon the security of any property of the company, or without giving security"; and their Lordships had no hesitation in coming to the conclusion that these words authorized a charge on uncalled capital. In that case, in the clause in question, the larger term preceded the lesser, it being first "any security of the company"; and secondly, "or upon the security of any property of the company"; and the Privy Council decided on the combined effect of the different parts of the clause.

It is suggested that in the present case the words "or in such other manner" have some reference to bonds or debenture notes, though the words occur as a distinct alternative. I am not able to find any reason why I should thus apply these words, "in such other manner," to the bonds or debenture notes. The word "manner" is a word of large import—of very large import—when used in powers of appointment, though perhaps to refer to the decisions on this point would be too technical for this case. I read the clause as a whole as em-

powering the company to borrow on the particular security mentioned in the first alternative, "and in such other manner as the company may determine." These words come at the end; and so far as I can see there is no "other manner" in which the company could borrow on the property and effects—on the property in its widest sense—except by borrowing on uncalled capital. I think, reading this article as a whole, and having read the particular parts of it, and seeing that the words which wind up the power are of a wide import, the article as it stands is sufficient to justify the company in borrowing upon its uncalled capital. The result is that the motion fails.

[The application was subsequently by consent treated as the hearing of the action, which was set down and dismissed with costs.]

Solicitors: *Collyer-Bristow, Russell Hill & Co., for Millington & Simpson, Boston.*

W. C. D.

*In re* ALLEN.  
ADCOCK *v.* EVANS.

[1895 A. 475.]

*Administration—Mortgage by Intestate—Surety—Administratrix—Specialty  
Creditor—Right of Retainer.*

A., being entitled for life to certain leasehold property with remainder to B., mortgaged the same to secure 800*l.*, B. joining in the mortgage so as to bind her estate in remainder; and A. covenanted with B. to pay all moneys secured by the mortgage, and to keep indemnified the estate and interest of B. in the premises against all such moneys; and further, in case B. should at any time thereafter pay any money for the redemption of the premises, forthwith to repay such money with interest.

A. died intestate in 1893 without having paid the mortgage debt, and administration was granted to B., who duly paid the interest:—

*Held*, in a creditors' action for the administration of A.'s estate, that B. was at law a specialty creditor in respect of the whole debt, and was entitled to retain the assets of the intestate in her hands to answer the debt.

SUMMONS in a creditors' action for the administration of the estate of an intestate by the plaintiffs, claiming as specialty creditors of the intestate a sum of 99*l.* for rent and other

CHITTY J.

1896  
JACKSON  
*v.*  
RAINFORD  
COAL  
COMPANY.

CHITTY J.

1896  
June 17.

CHITTY J. moneys due on the covenants contained in a certain indenture of lease.

1896  
~  
*In re*  
ALLEN.  
ADCOCK  
*v.*  
EVANS.  
—

The defendant, as administratrix of the intestate, claimed to retain the sum she had in hand as against the creditors of the intestate under the following circumstances:—

The intestate, being entitled as tenant for life with remainder to the defendant absolutely to certain leasehold premises under a voluntary settlement dated July 21, 1877, by an indenture of mortgage dated July 10, 1893, and made between R. W. Parker, the trustee of the said settlement of the first part, the intestate of the second part, the defendant of the third part, and J. E. Rowling of the fourth part, in consideration of the sum of 800*l.* advanced to her by Rowling, covenanted with him for payment of the said sum of 800*l.* on January 10 then next, and of interest thereon till payment as therein mentioned; and Parker as trustee, by the direction of the intestate and the defendant, demised, and the intestate as to her estate and interest, and the defendant as to her estate and interest, demised and confirmed the leasehold premises to Rowling for the residue of the term for which the same were holden, subject to redemption as therein mentioned. And the intestate covenanted with the defendant to pay all money thereinbefore covenanted to be paid, and save harmless and keep indemnified the estate and interest of the defendant in the leasehold premises from and against all such moneys, and all actions, proceedings, costs, claims, and demands in respect thereof; and, in case the defendant should at any time thereafter pay any money for the redemption of the premises, forthwith to repay such money to her with interest at 5 per cent. per annum.

The intestate died on November 12, 1893, and letters of administration to her estate and effects were granted to the defendant on August 16, 1894.

The whole of the principal money due on the mortgage still remained unpaid; but the defendant had, since the death of the intestate, duly paid all interest under the mortgage.

The defendant had assets of the intestate in hand amounting to the sum of 399*l.*, which she claimed to retain in respect of the mortgage debt of 800*l.*



The question was whether she was entitled to retain that sum. CHITTY J.

*Eastwick*, for the plaintiffs. The defendant is not a specialty creditor, and has no right of retainer as against the plaintiffs, who are specialty creditors.

*A. R. Kirby*, for the defendant, the administratrix. The defendant is entitled to retain this money. It is a claim for damages for breach of a covenant to pay a fixed sum on a certain day, for which there is a certain standard or measure. The defendant has been injured to the extent of the whole amount of the money that the intestate ought to have paid. At law the defendant is a specialty creditor: *In re Compton* (1); *Lethbridge v. Mytton* (2); *Loosemore v. Radford* (3); *Ferguson v. Gibson* (4); *Mayne on Damages*, 5th ed. p. 321.

*Eastwick*, in reply.

CHITTY J. A legal personal representative has a right of retainer only against creditors of equal degree; a simple contract debt cannot be retained as against a specialty creditor. That is settled law. In this case the defendant, the administratrix, has a covenant from the intestate to pay on a given day the sum secured by the mortgage. The sum was payable on a day long since past, and, as it was not paid, the defendant, if she were not administratrix, would be entitled to sue. She is both creditor and debtor for the amount due.

The question is, what is the measure of damages? The cases which have been cited shew that the measure is the whole amount due on the mortgage.

The property was settled, the intestate having a life estate with remainder to the defendant. It was then mortgaged for 800*l.*, the defendant joining at the request of the intestate as surety. She did not concur in the covenant to pay, but mortgaged her estate in remainder, and the intestate covenanted to indemnify her against the debt. There are three distinct covenants, and by suing on the first of them the defendant could, if she were not the administratrix, recover the whole

(1) 30 Ch. D. 15.

(2) 2 B. & Ad. 772.

(3) 9 M. & W. 657.

(4) L. R. 14 Eq. 379.

1896  
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In re
 ALLEN.
 ADCOCK
v.
 EVANS.
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CHITTY J. sum. It follows that at law upon such a covenant she is a specialty creditor for the whole debt, and she is, therefore, entitled to retain the amount in her hands.

1896

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*In re*

ALLEN.

ADCOCK

v.

EVANS.

Solicitors: *Ullithorne, Currey & Currey, for Jessopp & Son, Bedford; Heath, Parker & Brett.*

G. M.

CHITTY J.

DIBBINS v. DIBBINS.

1896

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June 18, 19.

[1895 D. 1107.]

Contract—Option of Purchase—Time limited—Three Months' Notice—Notice by Agent—Unauthorized Agent—Ratification.

Articles of partnership provided that, on the death of either partner, the survivor should have the option of purchasing the deceased partner's share, upon giving notice in writing of his intention so to do within three months from the death, and that in ascertaining the value of the deceased partner's share after such notice nothing should be allowed for the goodwill of the business. The surviving partner was of unsound mind, but notice of his intention to purchase was given on his behalf by his solicitor within three months from the death. An order was subsequently made under the Lunacy Acts authorizing a notice being given on his behalf, and a second notice was given accordingly, but after the three months had expired:—

Held, that as the option to purchase had not been exercised within the time limited, there was no contract which could be confirmed by the second notice, and, consequently, that the committee of the surviving partner was not entitled to the benefit of the provision in the articles.

Holland v. King (6 C. B. 727) followed.

Bolton Partners v. Lambert (41 Ch. D. 295) distinguished.

TRIAL OF ACTION.

Articles of partnership of October, 1892, provided that on the death of either partner during the partnership term the surviving partner should have the option of purchasing the share of the deceased partner upon giving notice in writing of his intention so to do to the legal personal representative of the deceased partner within three calendar months from the death: that in ascertaining the price to be paid for the share of a deceased partner after such notice, nothing should be allowed for the goodwill of the business. The articles provided for the

realization of the assets of the partnership if no arrangement was made under the foregoing provision. CHITTY J.

On April 5, 1895, one of the partners died, having appointed the plaintiffs his executors. The surviving partner, the defendant, was at this time a person of unsound mind not so found by inquisition.

1896
DIBBINS
v.
DIBBINS.

On July 4, 1895, a notice in writing of that date, signed by Thomas Lovell, purporting to act as solicitor for the defendant, was served on the plaintiffs, which purported to give them notice that it was the intention of the defendant to purchase the share of the deceased partner in the business.

Under an Order in Lunacy of July 23, 1895, the defendant's committees were authorized, on his behalf, to give notice of their intention to purchase the deceased partner's share; and on August 8, 1895, a notice of intention to purchase was served on the plaintiffs in pursuance of this order.

The plaintiffs by this action claimed a declaration that neither of the said notices was a valid notice within the meaning of the articles of partnership; that the assets of the partnership ought to be realized; and that the usual accounts might be taken and the partnership wound up.

The action now came on for trial; but the only question argued was whether, under the circumstances, either of the said notices was valid.

Farwell, Q.C., and *T. L. Wilkinson*, for the plaintiffs. A time was limited by the articles within which the option to purchase was to be exercised; if notice was not sent within the time limited no contract was made, and, consequently, there was nothing to be ratified. The surviving partner was not able to give notice himself, and the notice on his behalf by the solicitor was of no effect, as the solicitor had no authority to act for him. When the committees were appointed the time limited had expired, and there was no contract for them to ratify. Were it not for *Bolton Partners v. Lambert* (1) this case would have been a simple one; but in *Bolton Partners v. Lambert* (1) there was no time limited, and in that case the

(1) 41 Ch. D. 295.

CHITTY J. Court did not overrule *Bird v. Brown* (1), *Holland v. King* (2), and *Doe v. Goldwin* (3), which are in our favour. Ratification cannot take place subsequently to the time fixed for the exercise of the option. The surviving partner, therefore, is not entitled to the benefit of the provision in the articles, as the first notice was invalid and the second notice came too late.

1896
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 DIBBINS  
 v.  
 DIBBINS.  
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*Eustace Smith* (*Byrne, Q.C.*, with him), for the defendant, the surviving partner. Ratification dates from the time of the doing of the unauthorized act by the agent: *Hagedorn v. Oliverson* (4); *Ancona v. Marks* (5); *In re Portuguese Consolidated Copper Mines*. (6) My contention is that the earlier authorities have been modified by *Bolton Partners v. Lambert* (7), on which I rely to shew that ratification is possible in this case. At the time when the option had to be exercised there was no committee, and the only way in which notice could be given was by a formal notice through the solicitor, as was done. The subsequent notice by the committees was a ratification of this notice, and there is now a contract binding the plaintiffs to sell to me pursuant to the articles.

*Farwell, Q.C.*, in reply.

CHITTY J., after stating the facts, continued:—The doctrine of equity, that time is not of the essence of the contract, is not one of universal application, and it is settled with reference to options of this kind that there is no difference as to time between the rule of equity and the rule of common law; in other words, in exercising an option of this nature where time is limited the option must be exercised (if at all) within the time for which it is expressed to be given, both at law and in equity.

It was admitted at the bar, and it is plain, that the notice first given was of no validity when given. The parties interested on behalf of the surviving partner took proceedings in Lunacy, and obtained an order authorizing his committees to give notice on his behalf. Pursuant thereto the committees gave what

(1) 4 Ex. 786.

(2) 6 C. B. 727.

(3) 2 Q. B. 143.

(4) 2 M. & S. 485.

(5) 7 H. & N. 686.

(6) 45 Ch. D. 16.

(7) 41 Ch. D. 295.



would have been a sufficient notice if it had been in time. It was now said that this amounted to ratification of the first notice, and that it had relation back to the time of this invalid notice. If that were so, the result would be that an option, which must be finally exercised within a limited time, would be well exercised after that time. *Bolton Partners v. Lambert* (1) was cited in support of that contention. That was a case of an offer accepted by an agent without authority, and the acceptance was afterwards ratified. In the meantime there had been an attempt to withdraw the offer, and the Court of Appeal held that the ratification related back to the acceptance. That was not a case like this, of an option which must be finally exercised within a certain time. There was no time limited within which ratification was required, and, ratification having been made within a reasonable time, the Court of Appeal thought that the doctrine of ratification relating back was properly applicable, and allowed it in that case; but the Court of Appeal did not purport to overrule the common law decisions—decisions of great weight—which have been referred to in the argument before me: so far from overruling them, the language of the Court is rather the other way, and Cotton L.J. mentioned one—*Bird v. Brown* (2)—in his judgment for the purpose of distinction.

Of those cases *Holland v. King* (3) comes first. An option was there conferred on the executor or administrator of a deceased partner of succeeding to his share in the business on giving notice within a time named to the surviving partners. The widow of one of the partners gave notice within the time; but she was not then his legal representative, and did not become so until after the time had expired. The Court certified to the Vice-Chancellor that the notice was not given within the time limited in the option. The Court proceeded on the ground that the notice to be effectual must be within the time, and that no subsequent ratification was valid. Maule J. said, during the argument (4): “The right of option is given . . . upon the express condition that it shall be exercised within three calendar

CHITTY J.

1896

DIBBINS

v.  
DIBBINS.

(1) 41 Ch. D. 295.

(2) 4 Ex. 786.

(3) 6 C. B. 727.

(4) Ibid. 740.

CHITTY J. months after the death. If the notice here given be held to be an effective notice, the consequence will be, that the widow might have given a notice that would have bound the surviving partners, and then might have waited for a longer period than three months, to see if it was worth while to avail herself of it."

1896  
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 DIBBINS
 v.
 DIBBINS.
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Doe v. Goldwin (1) related to a notice to quit, which would operate at common law to terminate a tenancy, and it was held that the notice to quit must be one which the tenant might safely act on, and consequently that a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it.

These two cases have an immediate bearing on this, because there time was held to be of essential value, and the doctrine of relation back did not apply.

Bird v. Brown (2), which was distinguished, as I have said, by Cotton L.J. in *Bolton Partners v. Lambert* (3), and was referred to as an ordinary case by Bowen L.J. in *In re Portuguese Consolidated Copper Mines* (4), was a case of stoppage in transitu. Rolfe B. said (5): ". . . the real question . . . is whether the ratification by Illins, after a conversion by the defendants, can have the effect of altering retrospectively the ownership of the goods, so as to prevent the plaintiffs from saying that the goods were theirs at the time of the conversion, which, if no subsequent ratification had occurred, certainly were theirs at that time, and would have so continued. We are of opinion that the ratification by Illins had no such effect."

To allow the exercise of the option here would not alter the whole contract, but would make a material alteration in it so as to bring the case within *Bird v. Brown*. (2) The ratification did not relate back there, as Rolfe B. said, and he explained under what circumstances ratification did relate back, and then he mentioned *Lord Audley's Case*. (6) *Bird v. Brown* (2) is in favour of the plaintiffs; and I must hold that the option has

(1) 2 Q. B. 143.

(2) 4 Ex. 786.

(3) 41 Ch. D. 295.

(4) 45 Ch. D. 16.

(5) 4 Ex. 798.

(6) Cro. Eliz. 561.

not been validly exercised. It makes no difference that the person to exercise it was of unsound mind. It is impossible to hold that an unauthorized agent could exercise such an option as this so as to bind a person incompetent to exercise the option himself.

CHITTY J.

1896

DIBBINS

v.

DIBBINS.

Solicitors for plaintiffs : *Greenop & Sons.*

Solicitor for defendant : *Thomas Lovell.*

W. C. D.

In re ELLIOT.

KELLY *v.* ELLIOT.

[1895 E. 493.]

CHITTY J.

1896

April 16, 18;

May 6;

June 10, 24.

Will—Absolute Gift—Subsequent Condition—Repugnancy—Restraint on Alienation—Legacies out of Proceeds of Sale.

A testator gave his plantations in Assam, and all other his estate, to the plaintiff absolutely subject to the payment of his debts, and, after appointing her executrix, continued, “on any sale by the plaintiff of the said plantations I will and direct her to pay my brother the sum of 1000*l.* out of the proceeds of such sale, also the further sum of 500*l.* out of the proceeds of such sale to” the testator’s sister :—

Held, that the direction to pay these legacies imposed no obligation on the plaintiff to sell; and further, that this direction was repugnant and void, and that the property, therefore, belonged to the plaintiff absolutely.

ADJOURNED SUMMONS.

The testator, who died in June, 1893, devised and bequeathed his plantations in Assam, and all other his property, estate, and interest of whatsoever nature and wheresoever situated which he should die possessed of or entitled to, to Mary Ann Kelly, the plaintiff, absolutely, subject to the payment of his debts, funeral and testamentary expenses, and, after appointing her executrix, continued, “on any sale by the said Mary Ann Kelly of the said tea plantations I will and direct her to pay my brother John Elliot the sum of 1000*l.* out of the proceeds of such sale, also the further sum of 500*l.* out of the proceeds of such sale to Isabella Boog,” the testator’s sister.

The tea plantations, according to the law of British India,

CHITTY J. vested in the legal personal representative (1), and at the death of the testator they constituted nearly the whole of his estate. The questions raised by this summons were, whether there was any implied trust or direction to sell the plantations for the purpose of paying these legacies, and, if not, as to the validity of the direction to pay. After the summons had been opened and argued, it was directed to stand over that evidence might be filed as to the amount of the testator's debts, from which it appeared that the debts and funeral expenses amounted to rather less than 2500*l.* Among the debts was a sum of 718*l.* owing to the agents who managed the plantations, and for which they had a lien on the produce: this debt was retained by the agents out of the produce. Another debt was a sum of 1500*l.* owing to the testator's brother, John Elliot; but this debt, as the Court found, had no relation to the two sums of 1000*l.* and 500*l.* given by the will. The debts other than that for 718*l.* had all been paid by the plaintiff as executrix with money raised by her on mortgage of the plantations. It also appeared that she had raised money in like manner for her own purposes. No evidence was given as to the value of the plantations.

Byrne, Q.C., and *A. R. Kirby*, for the plaintiff. The legacies are payable only in the event of the plaintiff selling these plantations; but there is no obligation upon her to sell: there is no implied trust in favour of the legatees. The condition as to these legacies amounts to a restraint on alienation; it certainly tends to prevent a sale. Supposing this were English real estate, such a condition as this would be void as a restraint on alienation: *In re Rosher* (2); *King v. Burchell*. (3) Such a condition is repugnant to absolute ownership: *Bird v. Johnson*. (4) The same principles are applicable to the present case.

H. Terrell, for the legatees. These are demonstrative legacies,

(1) See the Indian Succession Act (X. of 1865), ss. 5 (succession to immoveable property in British India regulated by law of British India wherever deceased owner was domiciled), 179 (all property of deceased person vests in executor or administrator as legal representative).
 (2) 26 Ch. D. 801.
 (3) Amb. 379.

(4) 18 Jur. 976.

to be provided out of the proceeds of sale of these plantations, which by British Indian law are personal estate. It cannot be supposed that the testator never meant the plaintiff to sell: though the gift of these legacies out of the proceeds of sale may be an inducement to her not to sell, there is no restraint on alienation; the restraint must substantially take away the power of alienation before the condition can be held void: *In re Macleay*. (1) The fact that the plaintiff has paid all the testator's debts will not alter the construction of the will. As executrix she is bound to sell for the purpose of paying the debts, and then these legacies are payable. As beneficiary the plaintiff has no right to say that she will not sell. The debts of this testator were far more than the personal estate in England, and he must have contemplated that these plantations would have to be sold. That explains the form of the gift. The legacies are well given, and the legatees are entitled to be paid.

Byrne, Q.C., in reply.

Cur. adv. vult.

June 24. CHITTY J. The will contains no express trust or direction to sell the Assam tea plantations. The first and more important question is whether, on the true construction of the will, there is any implied trust or direction to sell; or, in other words, whether any obligation is imposed on the plaintiff to sell the plantations, and to pay out of the proceeds the sums of 1000*l.* and 500*l.* to the testator's brother and sister. The plantations, according to the law of British India, vest in the legal personal representative. [His Lordship having stated the facts as to the amounts of the trustee's debts as above, and the will, and having read the words as to the payment of the legacies, continued:—]

Taking the words as they stand, they do not import any obligation to sell: they leave it to the plaintiff to sell or not to sell as she may think fit. The words are peculiar. The sale referred to is a sale by her, and apparently a sale by any person claiming under her is not within the clause. On a just

CHITTY J.

1896

In re
ELLIOT.
KELLY
v.
ELLIOT.

(1) L. R. 20 Eq. 186.

1896

In re
ELLIOT.
KELLY
v.
ELLIOT.

CHITTY J. construction of the testator's language I can find no sufficient ground for holding that the term "sale" means anything but a sale in the ordinary course of the term. Consistently with the language used, she could mortgage the plantations, let them, settle them, and give them by instrument inter vivos or by will free from any claim on the part of the testator's brother or sister. I think he meant neither more nor less than just what he said—if she thought fit to sell, she was to pay the two sums to his brother and sister. To hold otherwise would, in my opinion, be acting on conjecture only, and would be making a will for the testator, and a will which he did not intend to make. Had he intended to give these sums to his brother and sister in any event, it would have been simple for him to give the legacies to them and the residue of his property to the plaintiff. A testator of the humblest capacity knows how to give a pecuniary legacy. Further, if he meant to impose on the plaintiff the obligation of selling, within what time did he mean that she should sell? There is no indication of any sort that she is to sell at the expiration of a year or at any other time during her life. No interest is given on the sums which are to be paid out of the proceeds. This shews that he meant her to sell, if at all, when she thought fit. The result, in my opinion, is that no obligation is imposed on the plaintiff to sell, and that the testator's intention was simply that the sums should be paid, and should only be paid, out of the proceeds, if and when she thought fit to make a sale. The brother and sister have no charge on the plantations.

The other question is whether the clause, as thus interpreted, is valid. The question is one of comparatively little importance, because it seems quite clear that the plaintiff will not sell the plantations if on a sale she has to pay the 1500*l*. But the question having been raised, it is right to decide it. It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells a part only of the proceeds shall belong to her, and the residue shall go to other persons. This

direction is, I think, repugnant and void. My opinion is based CHITTY J.
 on the broad general principle of law. The case does not fall 1896
 within any of the exceptions which have been allowed—such, In re
 for instance, as those discussed and admitted by Sir G. Jessel ELLIOT.
 in *In re Macleay*. (1) KELLY
 v.
 ELLIOT.

Solicitors : *Churchill ; Lumley & Lumley*.

(1) L. R. 20 Eq. 186.

W. C. D.

NORTH J.

In re HARKNESS AND ALLSOPP'S CONTRACT.

1896

June 2.

[1896 H. 1057.]

Married Woman—Trustee—Sale of Real Estate held on Trust for Sale—Conveyance to Purchaser—Concurrence of Husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 18, 24.

The Married Women's Property Act, 1882, does not enable a woman married since the commencement of the Act, being a trustee of real estate for sale, to convey to a purchaser except with the concurrence of her husband, and by a deed acknowledged by her.

SUMMONS under the Vendor and Purchaser Act, 1874, by Samuel Allsopp & Sons, Limited, purchasers of real estate, asking for a declaration that Edith Herbert Harkness (the wife of Thomas Harkness), Alfred Reckless, and Herbert Hall, the vendors, could not, in pursuance of the provisions contained in the contract for sale, dated February 24, 1896, effectually convey the real estate comprised in the contract so as to vest the same in the purchasers, except with the concurrence of the said Thomas Harkness, and by a deed acknowledged by his wife.

By a deed dated July 3, 1885, the real estate in question was conveyed unto and to the use of Edith Herbert Hall (then a spinster), Alfred Reckless, and Herbert Hall in fee simple as joint tenants, upon trust to sell the same, and to hold the proceeds of sale upon trust for division as therein mentioned.

In August, 1889, Edith Herbert Hall married Thomas Harkness.

On February 24, 1896, the three trustees entered into the contract to sell the property to Samuel Allsopp & Sons, Limited. The purchasers required the concurrence of the husband of Mrs. Harkness in the conveyance to them; the vendors contended that his concurrence was unnecessary. The summons was taken out for the determination of this question.

Swinfen Eady, Q.C., and *Peterson*, for the purchasers. The question in dispute turns upon the construction of the Married

Women's Property Act, 1882. (1) Before the Act the concurrence of the husband in the conveyance to the purchaser would have been necessary, and a contract for sale could not have been enforced against a married woman who was a trustee for sale: *Avery v. Griffin*. (2) The expression "as her separate property," as used in sub-s. 1 of s. 1, is only applicable to property in which the married woman is beneficially interested. Again, how could a trustee "dispose of" trust property by her will? And the words "without the intervention of any trustee" are inapplicable to trust property. This view is confirmed by the way in which the expression "separate property" is used in other sections of the Act.

Then s. 18 expressly empowers a married woman who is a trustee to transfer certain specified kinds of personal property. The section does not apply to real estate. And the section would have been unnecessary if s. 1, sub-s. 1, had applied to trust property. The Act deals only with the rights of a married woman as between her husband and herself, and was intended to protect

(1) The following are the most material provisions of the Act:—

The title of the Act is—"An Act to consolidate and amend the Acts relating to the property of married women."

By s. 1, "(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee."

Sect. 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public

stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole."

Sect. 24: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action."

(2) L. R. 6 Eq. 606.

NORTH J.

1896

In re

HARKNESS
AND
ALLSOFF'S
CONTRACT.

NORTH J. her property from him. It has no application to property of which she is a trustee, except so far as it is expressly made applicable to trust property by s. 18.

1896
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*In re*  
 HARNESSE  
 AND  
 ALLESOPP'S  
 CONTRACT.  
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*Brinton*, for the vendors. The concurrence of the husband is not necessary. The Act was intended to apply to married women who hold real estate on trust. Every word in sub-s. 1 of s. 1 need not apply to every case; the words are cumulative, and were meant to include every kind of property. Strictly speaking, s. 18 may have been unnecessary; but that is not a conclusive argument. The Act is not limited to the settlement of questions between husband and wife: *In re Drummond and Davie's Contract*. (1) It might be impossible for a purchaser of land from a married woman to know whether she was a trustee of it or not. Except under this Act or the Fines and Recoveries Act, a purchaser of land from a married woman would not get the legal estate: *Cahill v. Cahill*. (2) In *Bathe v. Bank of England* (3) it was held that a married woman, who was executrix and a residuary legatee under a will, and, being deserted by her husband, had obtained an order for the protection of her property under s. 21 of the Divorce Act of 1857, could transfer Consols standing in the name of her testatrix as if she were a feme sole. In that case the married woman had a beneficial interest in the property of which she was a trustee; and that is so in the present case. It would be most inconvenient that the Act should not apply to all trust property. The object was to place married women in the position of a feme sole in regard to trust property as well as property of which they were absolute owners.

*Swinfen Eady, Q.C.*, in reply. *Bathe v. Bank of England* (3) turned upon the construction of the Divorce Act of 1857, in which there was no section like s. 18 of the Act of 1882. Moreover, in that case the married woman was the sole beneficiary. The suggested construction of the Act would enable a married woman who is a trustee to render the trust property liable for her own debts. In *In re Drummond and Davie's Contract* (1) there was no trust.

(1) [1891] 1 Ch. 524.

(2) 8 App. Cas. 420.

(3) 4 K. & J. 564.

NORTH J. I have had occasion to consider this point before, and there is no reason why I should postpone giving my judgment. In my opinion the concurrence of the husband in the conveyance is necessary, notwithstanding the Married Women's Property Act. The first thing attracting attention in construing the Act is its title—"The Married Women's Property Act, 1882." How can it be fairly said that property of which a married woman is the sole trustee, or one of several trustees, is her property? It is not. She holds it in trust, but it is not her property in the ordinary sense of the word. I think that the title indicates the purpose which the Act was intended to effect. The object was to prevent the property of married women from being under the control of their husbands, as it had been. At one time it was almost entirely so; but by degrees various devices were resorted to by which the property of a married woman was prevented from becoming absolutely the property of her husband, and at last it was thought desirable to alter the law, and to say that a married woman's property should be her own, and not her husband's. This Act was then passed. It was not the first Act on the subject. An Act had been passed in 1870; but the Act of 1882 went further than anything which had been done before. It was a long step in advance at the time when it was passed. But its object was to prevent a married woman's property from becoming her husband's property. I think that intention is very fairly shewn in sub-s. 1 of s. 1 of the Act itself. It is not necessary for me to criticise in detail the various sections which have been referred to, although I have something to say about two or three of them. I will take s. 1, sub-s. 1, first. It is in these terms: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing . . . of any real or personal property . . . in the same manner as if she were a feme sole, without the intervention of any trustee." I have omitted a few words for the moment. A married woman is to be capable of acquiring, that is, getting property and holding it as hers, "without the intervention of any trustee." It need not be conveyed to trustees for her separate use, but she may acquire it herself without the

NORTH J.

1896

*In re*

HARKNESS

AND

ALLSOPP'S  
CONTRACT.

NORTH J. intervention of any trustee. If she does acquire it, she may also hold it without the intervention of any trustee. It is no longer necessary, as was formerly the case, either to find a trustee to act for her, or, if there be no trustee, to declare her husband to be a trustee for her. If the married woman wishes to sell the property or give it away, she can do so without the intervention of a trustee. She is to be capable of disposing of the property "by will or otherwise." These are some of the words which I omitted to read. I do not think there is any magic in those words: they were used to confer power upon a married woman to make a will as she could not have done before. The phrase "without the intervention of any trustee" does not, of course, refer to what she may do by will. It refers to the state of things during her life while the property is her property and is held by her. Then the other words which I omitted for the moment are very important: "A married woman shall . . . be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property *as her separate property* . . . ." What does that mean? It means separately from her husband, so that she can deal with the property as she pleases, instead of its being his to deal with as he likes. She is empowered to do this, although there is no trustee to give her the protection which was formerly considered necessary, but is no longer to be necessary, for that purpose. It is unnecessary to refer to the many other sections in the Act in which the expression "her separate property" is used in the same way. A married woman's property is to be "her separate property"—separate, that is, from the only person who could before interfere with the possession of it, namely, her husband. It is to be separate from him without the intervention of a trustee. To speak of a married woman's property as her separate property is quite intelligible if it is her own property; but to talk of a married woman's separate property when she is a trustee of the property perhaps for another married woman, whose separate property it may also be, is not a very natural use of the term, and is not in my opinion the sense in which the words are used in the Act.

The other two sections to which I wish to refer particularly



are ss. 18 and 24. Sect. 18 differs somewhat from the others. I have hitherto referred to the Act as dealing only with a married woman's own property; but in s. 18 there is a departure from what I consider to be the general scope of the Act. The Legislature could not shut their eyes to the fact that a married woman is now more frequently perhaps than formerly an executrix or an administratrix, and certainly much more frequently a trustee. Sect. 18 goes rather beyond the general scope of the Act in providing for something outside the special purpose for which the Act was passed, and I think that is the reason why it was introduced. [His Lordship read s. 18, and continued:—] It has been suggested that this section is confined to property of the particular description mentioned in it. I do not quite agree in that view. In my opinion the earlier part of the section goes further. I think that a married woman who is an executrix or trustee may sue or be sued in respect of the trust property whatever the nature of the property may be of which she is executrix or trustee. But the section goes on to give directions as to the transfer of certain specified kinds of personal property, and I cannot imagine that the Legislature could have intended by the words which they have used to enact that the married woman may convey real estate of which she is a trustee without the concurrence of her husband. It is incredible that a direction that a married woman who is a trustee, alone or jointly, of property subject to any trust, may "transfer or join in transferring any such annuity or deposit as aforesaid, &c.," could possibly be intended to mean that she may transfer anything except the particular things which are enumerated at some length in the section, and are so enumerated because they have been already referred to in the ss. 6, 7, and 8. They are mentioned here again for a particular purpose; but it would be most strange that such language should be used if it had been intended that the married woman may not only sue and be sued in respect of trust property of every kind, but may also convey or transfer the same. I think words to that effect would have been used if that had been meant. I think the language of s. 18 is strongly in favour of the view that the Act does not apply to a conveyance of real estate in

NORTH J.

1896

*In re*  
HARKNESS  
AND  
ALLSOPP'S  
CONTRACT.  
—

NORTH J. fee simple by a married woman who is a trustee of it. I do not find in s. 24 anything which assists me much. That section again goes outside what I have suggested to be the main scope of the Act, and deals not with a married woman's separate property, but with matters in respect of which she is acting as a trustee or as executrix or administratrix, and it is inserted rather for the purpose of shewing that where she is so acting her husband is to have to some extent, at any rate, that protection from his wife which is given to his wife from him from the beginning to the end of the Act. It is a very small return made to him in compensation for what he has to give up to her. In my opinion, therefore, in the present case a conveyance cannot be effectually made to the purchasers unless with the concurrence of Mrs. Harkness' husband, and by deed acknowledged by her.

1896

*In re*

HARKNESS  
AND  
ALLSOPP'S  
CONTRACT.

Solicitors; *Geare, Son & Pease; Indermaur & Brown.*

W. L. C.

NORTH J.

1896

*June 5, 6.*

*In re* WEEDING.  
ARMSTRONG v. WILKIN.

[1896 W. 697.]

*Will—Construction—Falsa Demonstratio.*

A testatrix bequeathed all her shares in two specified railway companies. She never had any shares in either company, but at the date of her will she held debenture stock of each company, which she continued to hold at the time of her death:—

*Held*, that the debenture stock passed under the bequest.

SUMMONS by Samuel Armstrong and A. E. F. Francis, the executors and trustees of the will of Jane Elizabeth Weeding, as plaintiffs, against Annie Wilkin (the wife of Herbert Wilkin) and her four children (three of whom were infants), as defendants, asking for the determination of the question, whether certain debenture stock of the Grand Trunk Railway of Canada, belonging to the testatrix at her death, and known as Perpetual 5 per cent. Debenture Stock Great Western Borrowed Capital,

passed under a bequest contained in the will to Annie Wilkin of "my shares in the Great Western Trunk Railway of Canada," or whether the same stock passed under the residuary bequest in the will.

The testatrix by her will, dated January 29, 1894, gave to Annie Wilkin "my shares in the Great Western Trunk Railway of Canada" absolutely. The testatrix also gave her "shares" in the Grand Trunk Railway of Canada to trustees, upon trust to pay the income thereof to Elizabeth Good during her life, and from and after her decease she directed that the same should fall into and form part of her residuary estate. And the testatrix devised and bequeathed the residue of her estate to her trustees, upon trust for sale and to pay the income of the residuary trust funds to Annie Wilkin absolutely during her life, and after her decease in trust for the children of Annie Wilkin in manner therein mentioned.

The testatrix died on July 1, 1895.

Elizabeth Good had died before her.

It was admitted on the hearing of the summons that there was not now any company called "The Great Western Trunk Railway Company of Canada," though there had formerly been a company called "The Great Western Railway Company of Canada," which, in August, 1882, was taken over by and united with the Grand Trunk Railway Company of Canada. The testatrix never at any time during her life possessed any shares in either the Great Western Railway Company of Canada or the Grand Trunk Railway Company of Canada. In 1880 she became possessed of 1000*l.* Perpetual 5 per cent. Debenture Stock of the Grand Trunk Railway Company of Canada, and also of 500*l.* Perpetual 5 per cent. Debenture Stock of the Great Western Railway Company of Canada. After the union of the two companies in 1882 the latter stock became known as "Perpetual 5 per cent. Debenture Stock Great Western Borrowed Capital," and the similar stock of the Grand Trunk Railway became known as "Perpetual Debenture Stock Grand Trunk Borrowed Capital."

These two sums of 1000*l.* and 500*l.* debenture stock were respectively possessed by the testatrix at the date of her will,

NORTH J.

1896

In re

WEEDING.

ARMSTRONG

v.

WILKIN.

NORTH J. and she continued possessed of the same respectively up to the time of her death.

1896

*In re*  
WEEDING.  
ARMSTRONG  
*v.*  
WILKIN.

*J. F. Popham*, for the plaintiffs.

*C. E. E. Jenkins*, for Annie Wilkin. The Court must have regard to all the circumstances, and endeavour to discover the intention of the testatrix. She could not have intended the bequest to have no effect, and there is nothing but the debenture stock on which it can operate. She must have intended that stock to pass. *Townsend v. Townsend* (1) is an authority directly in point. If there were something to answer the description the Court would not extend its natural meaning; but here there is nothing but the debenture stock to which the description can apply: *In re Bodman* (2); *In re Nottage*. (3) In the latter case it was held that debentures passed under a bequest of debenture stock or shares.

*Bardswell*, for the residuary legatees. The debenture stock did not pass. Debenture stock will not pass under a gift of debentures: *In re Lane*. (4) *In re Bodman* (2) is really an authority in my favour. In *In re Nottage* (3) the Court considered that the testator had provided a glossary of his own. Here the testatrix may have contemplated buying shares in the company. *In re Gray* (5) shews that the gift fails for uncertainty. In *Dillon v. Arkins* (6) it was held that a gift of shares in the Alliance Gas Company did not pass debentures of the company.

*C. E. E. Jenkins*, in reply. In *Dillon v. Arkins* (6) the testator had shares in the company. In *Gallini v. Noble* (7) a gift of all the testator's money in the Bank of England was held to pass stock in the funds, the testator never having had any cash in the Bank. In *Dobson v. Waterman* (8) a gift of 3 per cent. Consolidated Bank Annuities was held to pass 3 per cent. South Sea Annuities, the testator having none of the former stock.

*Cur. adv. vult.*

- (1) 1 L. R. Ir. 180.
- (2) [1891] 3 Ch. 135.
- (3) [1895] 2 Ch. 657.
- (4) 14 Ch. D. 856.

- (5) 36 Ch. D. 205.
- (6) 17 L. R. Ir. 636.
- (7) 3 Mer. 691.
- (8) 3 Ves. 308, n.



June 6. NORTH J. (after stating the facts). The question is, whether by the gift of shares in these two railway companies the debenture stock which the testatrix had passed. With respect to the stock of the Grand Trunk Railway Company it is immaterial whether it passed or not, as in any case, in the events which have happened, it falls into the residue. But I think it is not unimportant, in considering the construction of the other gift, that in two cases the will has purported to bequeath shares when the testatrix had no shares, but only debenture stock. In my opinion the debenture stock did pass. The will thus expressed clearly shews an intention to pass something. The bequest was not intended to be inoperative. I quite agree that, if the testatrix had had any shares in one of the companies, debenture stock of that company could not pass, because there would have been something properly described by the gift, and there would have been no reason for giving any extension to the meaning of the words. But here words are used which do not accurately describe anything which the testatrix ever had. No doubt she intended to pass something, and there is nothing except this debenture stock on which the gift can operate. If the words had been "all my share" in the Great Western of Canada Railway it would have been equivalent to a gift of all my property in the railway company. But the fact that the phrase used is "all my shares," not "all my share," does create a little more difficulty in holding that the debenture stock passed.

I think, however, that the difficulty is not insuperable. A much greater difficulty would have arisen if at any time between the date of her will and her death the testatrix had acquired shares, according to *In re Bodman*. (1) In that case a testatrix had both shares and debenture stock in a company at the date of her will, and it was held that the latter did not pass by a gift of shares. In my opinion that fact makes all the difference; and, if this testatrix had subsequently to the date of her will acquired shares in the company, I should have held that a different construction must prevail. It may be rather singular that the construction of the will should depend on what

(1) [1891] 3 Ch. 135.

NORTH J.

1896

*In re*

WEEDING. <sup>s</sup>

ARMSTRONG

*v.*

WILKIN.

NORTH J. happened subsequently to its date. But the reason is obvious, for in that case there would have been no ambiguity, as the testatrix would have had property which the words of the will aptly described.

1896  
 In re  
 WEEDING.  
 ARMSTRONG  
 v.  
 WILKIN.  
 —

In *In re Nottage* (1) Rigby L.J. used these words: "You have got a long way towards a specific gift if you come to the conclusion that he is trying to describe something which he has." He says, "You have got a long way." In the present case I think there is enough to enable me to go the whole way, because two sets of shares are given, when in each case the testatrix had no shares, but had some debenture stock and nothing else. That satisfies me that she intended the stock to pass.

The Irish case, *Townsend v. Townsend* (2), looks very much in point, and it was properly cited to me; but I do not think it really affects the present case. The Vice-Chancellor there, on the construction of the will before him, came to the same conclusion as I have come to on the construction of the will with which I have to deal.

Solicitors: *Woodcock, Ryland & Parker; Percy F. Higginson; Snow, Snow & Fox.*

(1) [1895] 2 Ch. 664.

(2) 1 L. R. Ir. 180.

## ALLCARD v. WALKER.

STIRLING J.

[1895 A. 530.]

1896

March 7;  
May 2.

*Mistake—Relief in Equity—Divorce—Variation of Settlement—Jurisdiction—Terms—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45—Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5—Married Woman—Disposition of Real and Personal Estate—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 1, 77—Malins' Act (20 & 21 Vict. c. 57).*

By a post-nuptial settlement executed in 1877, and acknowledged by the wife under the Fines and Recoveries Act, property of the wife was settled upon trusts for the benefit of the husband and wife and the issue of the marriage; and the husband and wife covenanted for the settlement of the wife's after-acquired property. In November, 1893, the marriage was dissolved on the ground of the adultery of the wife. In December, 1893, the husband presented a petition for variation of the settlement, setting out the funds subject to the trusts thereof; and the wife by her answer admitted the same to be correct. On April 24, 1894, a consent order was made on the petition varying the settlement by directing payment of certain annual sums to the husband and the only child of the marriage. The wife, having married the co-respondent, brought an action for a declaration that certain property which upon the petition for variation had been assumed by all parties to be bound by the settlement was not so bound. The Court, being of opinion that the property in question was not included in the settlement, and that the terms of the order for variation had been agreed to by the parties under a common mistake, granted relief to the plaintiff, but upon the terms that any application to the Divorce Court, under s. 45 of the Act 20 & 21 Vict. c. 85, for a further settlement upon the husband and child of the marriage, should be dealt with in all respects as if it had been made before April 24, 1894, and was being considered by the Court on that day.

Real estate which devolved upon the wife upon the intestacy of her father, who died in 1893, was held not to be at the date of the settlement an "estate" in land within the meaning of s. 77 of the Fines and Recoveries Act; and interests in personal estate, to which she became entitled under the will of a testator who was living at the date of the settlement, were held not to be "future interests" of which she could dispose under the provisions of Malins' Act.

The "future interests" contemplated by the Act are interests to which, at the date of the disposing deed, the married woman has some existing title at law or in equity.

## ACTION.

The plaintiff, Mrs. Georgiana Augusta Allcard, in this action claimed—(1.) a declaration that certain funds held by or in the

1896  
~  
ALLCARD  
v.  
WALKER.  
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STIRLING J. hands of the defendants, E. L. Walker, C. W. Murray, and Thomas Lupton, as if subject to the trusts of a post-nuptial settlement executed by her on June 12, 1877, were in fact her absolute property, and that the said defendants might be ordered to transfer and pay the same to her free from the said settlement; (2.) a declaration that the share of the plaintiff in the real estate of her father, S. A. E. Konarski, was not subject to or affected by the said settlement; and (3.) a declaration that all such parts of the shares and interests of the plaintiff in the estate of her deceased uncles, James and George Lucas, and in the personal estate of her said father, or in any of such estates as had not been already paid to or come into the hands of the said defendants, were free from all claims of the said defendants as trustees of the said settlement, and that the plaintiff was entitled to receive and retain the same for her own use.

On May 6, 1873, the plaintiff, then Georgiana Augusta Konarski, spinster, intermarried with the defendant, Waldegrave Charles Fearn Kell. There was issue of the marriage one child only, namely, the defendant, Vernon George Waldegrave Kell, who attained the age of twenty-one years in 1894. No settlement or agreement for a settlement was made before or upon the said marriage; but on June 12, 1877, the above-mentioned settlement was executed by Mr. and Mrs. Kell, and was acknowledged by Mrs. Kell in accordance with the requirements of the Fines and Recoveries Act. It contained recitals to the effect that Mrs. Kell, as one of the next of kin of her uncle, James Lucas, deceased, was entitled to one equal undivided fifteenth part or share of his residuary personal estate; but that the amount and particulars of such personal estate had not been ascertained, and that the one-fifteenth part or share had not been reduced into possession; but it was estimated that the share would exceed in value the sum of 4000*l.*; and by the operative part of the deed, Mr. and Mrs. Kell assigned, or purported to assign, to trustees the one-fifteenth or other the share to which Mrs. Kell, as one of the next of kin of James Lucas, or Mr. Kell in her right, was entitled in the residuary estate of James Lucas, upon trusts (subject to the payment thereof of a sum of 200*l.* to Mr. Kell) for investment and payment of the



income to Mrs. Kell during the joint lives of herself and Mr. STIRLING J. Kell for her separate use without power of anticipation; and after the death of either to the survivor during his or her life; and after the death of the survivor upon trust for the issue of the marriage as Mr. and Mrs. Kell should jointly appoint; and in default of such appointment as the survivor should appoint; and in default of and subject to such appointment upon trust for all the children of the marriage who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry. The deed also contained a clause to the effect that if at any time during the joint lives of the said Mr. and Mrs. Kell any real or personal estate whatever, being of the value of 500*l.* or upwards from any one source, should be devised or bequeathed, or descend to or devolve upon or vest in the said Mrs. Kell or Mr. Kell in her right, or to or upon or in any person or persons in trust for her, then and in every such case Mr. and Mrs. Kell would make, do, acknowledge, and execute all such acts, deeds, conveyances, assignments, and assurances as the trustees of the settlement should require for assuring all such real and personal estate unto and to the use of the trustees, to be held upon the same trusts as the trust funds thereinbefore settled. It was also agreed and declared that the agreements for settlement therein contained should be deemed and construed to extend to and include, in addition to any such future acquired real and personal property, all (if any) the freehold, copyhold, and leasehold estates, and all the stocks, funds, and securities for money, including collectively in value the sum of 500*l.* to which Mrs. Kell, or Mr. Kell in her right, was then entitled in possession, remainder, reversion, or contingency, in addition respectively to the property thereafter and specifically settled.

1896  
ALLCARD  
v.  
WALKER.  
—

On May 3, 1893, a decree nisi was made for the dissolution of the marriage of Mr. and Mrs. Kell on the ground of the misconduct of Mrs. Kell with James Allcard, who was the co-respondent in the suit. On November 13, 1893, the decree was made absolute, and on November 18 the plaintiff intermarried with James Allcard, whose wife she now was. No settlement, or agreement for a settlement, was made before or upon this

STIRLING J. marriage. On December 5, 1893, Mr. Kell presented a petition to the Divorce Court for variation of the settlement of June 12, 1877. It set out in paragraph 6 the funds there alleged to be subject to the trusts of the settlement, including a sum of 4344*l*. Consols which had come to the hands of the trustees after the decree nisi was made. Paragraphs 7, 8, and 9 set out certain funds which had not then come to the hands of the trustees, but which Mrs. Kell was entitled to; and paragraph 10 stated as follows: "The funds, shares, and interest mentioned in paragraphs 7, 8, and 9 hereof will be subject to the trusts of the said indenture of settlement of the 12th June, 1877." Mrs. Kell, then Mrs. Allcard, put in an answer to the petition, and she thereby either expressly admitted or did not dispute the allegations in the petition as to the property subject to the trusts of the settlement, and, in particular, she did not dispute paragraph 10. The application was referred to the registrar, who, on April 4, 1894, reported that it was proposed, with the consent of Mr. Kell and Mrs. Allcard, that the trustees of the settlement should, out of the income arising from the trust funds comprised therein, during the joint lives of Mr. Kell and Mrs. Allcard, pay to Mr. Kell 300*l*. per annum, and to their only son 150*l*. per annum, and on the death of either Mr. Kell or Mrs. Allcard, and during the lifetime of the survivor, pay to their son 300*l*. per annum in lieu of 150*l*.; and, further, that a certain sum of 113*l*. paid by Mrs. Allcard for the advancement of the son should be repaid to her out of a sum raised under the powers of the settlement for that purpose, and that during the joint lives of Mr. Kell and Mrs. Allcard the latter should have the right to nominate two out of the three trustees of the settlement, and Mr. Kell the third. The registrar expressly reported that the son (who was then an infant) was not separately represented; but in consideration of the provision to be made for him out of the trust funds during the lifetime of his father and mother, it did not seem that on the whole his interests under the settlement would be prejudicially affected. On April 24, 1894, an order was made varying the settlement in accordance with the registrar's report. At the date of the settlement the plaintiff was entitled to three interests only:

1896  
ALLCARD  
v.  
WALKER.  
—

first, her share of the personal estate of James Lucas, expressly STIRLING J. dealt with by the settlement; secondly, an interest under the will of her grandfather, who died in 1830, in certain personal estate, contingent on her surviving the expiration of twenty years from April 24, 1871, but as to one moiety subject to the life interest of her father, who did not die until January, 1893; and, thirdly, an interest under the marriage settlement dated April 24, 1840, of her father and mother in certain personal estate subject to the life interest of her father. Subsequently to the date of the settlement she became entitled under the will of George Lucas, who died on June 7, 1890, to certain interests in personal estate, and the proceeds of real estate devised upon trust for sale, and to interests, as one of the co-heiresses-at-law and next of kin of her father, who died intestate in January, 1893, entitled to considerable real and personal estate. At the date of the decree nisi sums amounting to about 25,000*l.* had been paid to the trustees of the settlement in respect of interests of the plaintiff, which at that date were vested in possession in her, or in Mr. Kell in her right. Between the dates of the decree nisi and the decree absolute sums amounting to about 4500*l.* were paid to the same trustees, and subsequently to the last-mentioned date sums amounting to about 6000*l.* were also paid to them. Sums amounting to about 18,500*l.* were still payable in respect of the plaintiff's interests in the estates of her father and James and George Lucas.

The writ in this action was issued on May 2, 1895, and the plaintiff thereby claimed declarations to the following effect: First, that all the funds transferred to the trustees of the settlement subsequently to the date of the decree nisi were the absolute property of the plaintiff. Secondly, that the share of the plaintiff in the real estate of her father was not subject to or affected by the settlement; and, thirdly, that all the funds which had not yet come to the hands of the trustees of the settlement in respect of the plaintiff's interests in the personal estates of her father and James and George Lucas were not subject to or affected by the settlement. No question was raised as to the sums amounting to 25,000*l.* which came to the hands of the trustees before the date of the decree nisi, and it

1896  
ALLCARD  
v.  
WALKER.  
—

STIRLING J. was further admitted at the bar on behalf of the plaintiff that  
 1896  
 ALLCARD  
 v.  
 WALKER.  
 — in the event of her claim to the other funds proving successful she was bound to elect, and that in the event of her electing to take in opposition to the settlement (as was her intention) the surplus income of the 25,000*l.* admitted to be effectually settled, after providing for the annual sums of 300*l.* and 150*l.* directed to be paid to Mr. Kell and his son by the order of April 24, 1894, ought to be applied in making good what might be lost by any parties disappointed by the plaintiff's election. On behalf of Mr. Kell and his son it was admitted that down to April 8, 1895, all parties had proceeded on the footing that the settlement of June 12, 1877, was binding upon the plaintiff.

*Cozens-Hardy, Q.C.*, and *Ashworth James*, for the plaintiff. In 1877 the plaintiff, being a married woman, could only contract so as to bind her property, whether in possession or reversion, by the aid of the provisions of the Fines and Recoveries Act or Malins' Act; and under those Acts she could not bind her after-acquired property.

The question is, what was the effect of the decree for dissolution of the marriage? The effect dates from the decree nisi, and not from the final order: *Wilkinson v. Gibson* (1); *Prole v. Soady*. (2) Except as to property of the wife reduced into possession by the husband before the decree nisi, the settlement, so far as the wife is concerned, was a nullity, and must be treated as if the husband had died upon that day. It has no effect except perhaps so as to bring into operation the doctrine of election.

There can be no question of affirmation or rectification of the settlement, because it was not merely voidable, but absolutely void. There was no contract at all.

The proceedings for variation of the settlement before the Divorce Court do not operate so as to bind the parties by way of estoppel or otherwise. No new contract was then entered into, nor was there any compromise of a doubtful right.

The relief now asked for by the plaintiff does not constitute any interference with the order of the Divorce Court; there will

(1) L. R. 4 Eq. 162.

(2) L. R. 3 Ch. 220.



still be ample funds to meet the annuities to Mr. Kell and STIRLING J. his son.

Since the date of the order nisi there has been no new settlement, and there has been nothing more than assent to the investment of funds subject to what has erroneously been considered as a binding settlement.

As to property which has not yet reached the hands of the trustees, there is no equity to prevent the plaintiff from interceding it.

Having regard to the case of *Codrington v. Codrington* (1), it is not disputed that the balance of the income arising from the funds which are admittedly bound by the settlement ought, after providing for the annuities, to go to the persons disappointed by the plaintiff's election to take against the settlement.

The plaintiff is entitled to a transfer of all the property which has reached the trustees since the date of the order nisi, and to a declaration that all her property which has not yet come to the hands of the trustees is not bound by the settlement.

There is some suggestion on the pleadings that there was a reduction into possession by reason of the trustees of the settlement being also executors of the instrument under which some of the property was derived; but that point is covered by *Baker v. Hall* (2) and *Wall v. Tomlinson*. (3)

*Hastings, Q.C.*, and *H. Terrell*, for the defendants, the trustees.

*Buckley, Q.C.*, and *A. àB. Terrell*, for the defendants, the Kells. By the settlement the wife purported to bind herself as to all property which should come to her.

Under the Fines and Recoveries Act she had power to dispose of any interests she might have in real estate.

The covenant to settle after-acquired property was a "disposition" by her within s. 77 of the Act, and operated so as to bind any real estate which should come to her. Any real estate, therefore, to which she is entitled under the will of George Lucas, or under the intestacy of her father, is bound by

(1) L. R. 7 H. L. 854.

(2) 12 Ves. 497.

(3) 16 Ves. 413.

STIRLING J. the settlement : *Briggs v. Chamberlain* (1) ; *Miller v. Collins* (2) ;  
 1896 *Pride v. Bubb* (3) ; *Crofts v. Middleton* (4) ; *Carter v. Carter*. (5)  
 ALLCARD Then, as to personalty, her right to deal with that is governed  
 v. by Vice-Chancellor Malins' Act (20 & 21 Vict. c. 57), under  
 WALKER, which a married woman can dispose of her future or rever-  
 sionary interests in personal estate. The effect of the plain-  
 tiff's covenant, therefore, was to bind not merely interests in  
 personalty to which she was then entitled in reversion, but also  
 any interest which was future in right and title, as well as  
 future in enjoyment.

Future property, possibilities, and expectancies are assignable  
 in equity : *Tailby v. Official Receiver*. (6)

[STIRLING J. Do you say that s. 77 of the Fines and  
 Recoveries Act includes mere future possibilities ?]

Yes ; and we submit that the covenant would bind an interest  
 derived under a will not made at the date of the settlement.  
 As regards interests not in possession at the date of the settle-  
 ment, no doubt it may well be they could only become bound in  
 the sense that the husband was entitled to reduce them into  
 possession—in which case they would be bound by his covenant.  
 Then as to the property not yet received by the trustees, the  
 parties to the divorce proceedings came before the Court on  
 the assumption that the settlement was binding and covered  
 all the lady's property, and on that footing the order was made.  
 She was then competent to bind herself, and is bound accord-  
 ingly. It is not disputed that she must elect.

The next question is, what is the effect of the divorce  
 proceedings as regards property which reached the hands of  
 the trustees after the date of the decree nisi, but before the  
 order absolute ?

In *Prole v. Soady* (7) no money was paid between the decree  
 nisi and the decree absolute ; that case, therefore, is no authority  
 upon the present.

In *Wilkinson v. Gibson* (8) the lady was not in a position to

(1) 11 Hare, 69.

(2) [1896] 1 Ch. 573.

(3) L. R. 7 Ch. 64.

(4) 8 D. M. & G. 192.

(5) [1896] 1 Ch. 62.

(6) 13 App. Cas. 523, 543.

(7) L. R. 3 Ch. 220.

(8) L. R. 4 Eq. 162.

bind her reversionary interests; the settlement, therefore, was **STIRLING J.** of course a nullity so far as she was concerned.

As regards all sums received by the trustees after the decree for divorce, they were paid to the trustees on the assumption by all parties that the settlement was valid and binding. The money was, therefore, paid under a mistake of law, and cannot be recovered by the plaintiff in any form of action: *Bate v. Hooper* (1); *Skyring v. Greenwood*. (2) Moreover, what was done in the proceedings for variation of the settlement in 1893 constituted a new settlement, which the plaintiff, being then a married woman, was by virtue of the Married Women's Property Act, 1882, perfectly competent to make.

[**STIRLING J.** Upon a decree for dissolution, has the Court power to direct a settlement of property not included in any settlement?]

*Milne v. Milne* (3); *Benyon v. Benyon* (4); 20 & 21 Vict. c. 85, and 22 & 23 Vict. c. 61.

[They also referred to *Campbell v. Bainbridge*. (5)]

*Cozens-Hardy, Q.C.*, in reply. The Fines and Recoveries Act does not apply. The plaintiff at the date of the settlement had no real estate, but only an expectancy. The Act does not give a married woman power to contract so as to bind her expectant future interests; it only empowers her to dispose of such interests as may be vested in her at the time. The definition of the word "estate" in s. 1 of the Act does not extend to a case where there is no estate or interest whatever.

Again, Vice-Chancellor Malins' Act has no application to this case. It does not avail as to property in possession, nor as to property to which the married woman is entitled under instruments made before the Act; and we submit that the right to dispose of "future or reversionary interests" does not extend to interests which are not in existence at the date of the disposition. Moreover, there was no consideration for the deed. But assuming that there was, the deed was void and inoperative so far as the plaintiff was concerned.

(1) 5 D. M. & G. 338.

(2) 4 B. & C. 281.

(3) L. R. 2 P. & M. 295.

(4) 15 P. D. 54.

(5) L. R. 6 Eq. 269.

STIRLING J. It is suggested that in order to recover the property from the trustees the plaintiff must bring an action for money had and received. But this is an action to recover specific property which by mistake has got into the hands of the trustees. The mistake was one of fact, and the Court of Equity will relieve either party from an arrangement entered into under a mistake of fact unless the interests of third parties have intervened, which is not the case here: *Huddersfield Banking Co. v. Lister & Sons* (1); *Cooper v. Phibbs* (2); *Jones v. Clifford*. (3) As to the funds which reached the hands of the trustees between the date of the decree nisi and the order absolute, anything done in that interval must be subject to the danger of being set aside by the decree being made absolute. After the decree was made absolute, no doubt the plaintiff assented to certain investments being made; but her rights were not thereby affected. If what was done in 1893 created a new settlement, no doubt the plaintiff's case fails; but we submit that there was no new settlement. The plaintiff will raise no objection to an application being made to the Divorce Court for the exercise of its discretion under 20 & 21 Vict. c. 85, s. 45. She is content that the whole income of the fund admittedly settled shall go to the father and son.

*Cur. adv. vult.*

May 2. STIRLING J. (after stating the facts). It will be convenient in the first instance to consider how far the settlement of June 12, 1877, bound the plaintiff. This instrument does not purport to have been made, and was not in fact made, in pursuance of any ante-nuptial contract. Whatever binding effect it has on the property of the plaintiff must be derived from the two statutes then in force which enabled married women to dispose of their property—namely, the Fines and Recoveries Act, and the statute 20 & 21 Vict. c. 57, commonly known as Vice-Chancellor Malins' Act. First, as to the Fines and Recoveries Act. At the date of the settlement the plaintiff was not entitled to any real estate. She first became entitled to real estate on the death of her father in

(1) [1895] 2 Ch. 273.

(2) L. R. 2 H. L. 149.

(3) 3 Ch. D. 779.



January, 1893. If the real estate to which she so became entitled is affected by the settlement, it must be by virtue of the covenant for the settlement of the plaintiff's after-acquired property therein contained. Now s. 77 of the Fines and Recoveries Act enables a married woman by deed "to dispose of lands of any tenure. . . . and also to dispose of, release, surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure." By s. 1 it is provided that "the word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity." The question then arises whether on June 12, 1877, the plaintiff, or her then husband in her right, had any estate at law or in equity in the real estate of her father, or any interest of any kind in, upon, or affecting such real estate. The answer in my judgment must be that she had not. Her father was then living, and all that she had was not an estate or interest at law or in equity in his real estate, but merely the possibility or expectation that at some future time, in the event of his dying intestate, an estate or interest might accrue to her.

Next, as to the effect of Vice-Chancellor Malins' Act. That Act enables a married woman "to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after" December 31, 1857, "and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid." It is to be observed that the title of the married woman must be derived under an instrument, and, secondly, that such instrument must be made after December 31, 1857. Now, of the five interests of the plaintiff that I have already specifically mentioned, the first and fifth arose under intestacies, and not under instruments; while the second and third arose under instruments made before December 31, 1857. Consequently, none of these interests could be disposed of under

1896  
ALLCARD  
v.  
WALKER  
—

STIRLING J. this Act. The remaining interests arose under the will of George Lucas, dated May 23, 1890, and it is contended that these are "future interests" within the meaning of the statute. In my judgment, they are not. At the date of the settlement they were mere possibilities or expectancies of interests, and were not interests either at law or in equity, nor future interests within the meaning of the Act. The "future interests" spoken of in the Act are, in my opinion, interests to which at the date of the disposing deed the married woman has some existing title at law or in equity. The words "future or reversionary interests" appear to be contrasted with estate "to which she or her husband in her right may be entitled in possession." An example of a future vested interest within the meaning of the Act would be a legacy which had become vested but was not then payable. I have not found any case on the construction of either of these statutes which is precisely in point; but in support of the view which I have expressed as to the difference between estates and interests and mere expectancies, I may refer to the propositions laid down by Lord Westbury in *Davis v. Angel* (1), and by Kay L.J. in *In re Parsons* (2), in the latter of which cases the previous authorities are elaborately considered. The result is that, in my opinion, the settlement of 1877 must be regarded, so far as it was effectual at all, as the settlement of Mr. Kell alone. The covenant on the part of the plaintiff was not, down to the dissolution of the plaintiff's marriage, in any way binding on her, but was void, and not merely voidable so far as she was concerned. This being the case, it was incapable of being simply affirmed by the plaintiff when she ceased to be under disability. If it became binding on her, it must be by reason of acts on her part which amount to the making of a new settlement. It is contended that such acts of hers are to be found in the proceedings upon the petition presented to the Divorce Court in December, 1893. At this time the plaintiff had married again; but as no settlement was made on the occasion of this second marriage the plaintiff was entitled for her separate use to all property of hers not bound by the settlement of 1877,

(1) 4 D. F. &amp; J. 524.

(2) 45 Ch. D. 51, 57.

and she was, with regard to such property, in the position of a STIRLING J.  
 feme sole. In that state of things she agreed to the terms  
 stated in the registrar's report, and embodied in the order of 1896  
 April 24, 1894. Those terms were entered into by the plaintiff ALLCARD  
 and the defendant Mr. Kell, and were sanctioned by the Court v.  
 on the assumption made by all that all the funds specified in WALKER.  
 the petition of Mr. Kell were or would be subject to the  
 trusts of the settlement of 1877. That assumption, in my  
 view, was incorrect, and the plaintiff desires relief on the  
 footing of having made a mistake. It is said for the de-  
 fendant, Mr. Kell, that the mistake was one of law, and  
 that relief cannot be given in respect of it. In my opinion  
 that is not so. I think, in the first place, that the mistake  
 was one which related to the existing rights and interests  
 under the settlement within the meaning of the law as laid  
 down by Lord Westbury in *Cooper v. Phibbs* (1), where he  
 says: "It is said 'Ignorantia juris haud excusat,' but in that  
 maxim the word 'jus' is used in the sense of denoting  
 general law, the ordinary law of the country. But when  
 the word 'jus' is used in the sense of denoting a private  
 right that maxim has no application. Private right of  
 ownership is a matter of fact; it may be the result also of  
 matter of law; but if parties contract under a mutual mistake  
 and misapprehension as to their relative and respective rights,  
 the result is, that that agreement is liable to be set aside as  
 having proceeded upon a common mistake." In the next place,  
 I observe that it is not accurate to say that relief can never be  
 given in respect of a mistake of law. It was laid down by  
 Turner L.J. in *Stone v. Godfrey* (2) that this Court has  
 power to relieve against mistakes of law as well as against  
 mistakes in fact, and this statement was recognised in the  
 judgments of the members of the Court of Appeal in *Rogers v.*  
*Ingham* (3), and particularly by Mellish L.J., who refers to  
 it and explains it thus: "That is to say, if there is any equit-  
 able ground which makes it, under the particular facts of the  
 case, inequitable that the party who received the money  
 should retain it." No doubt the jurisdiction is one to be

(1) L. R. 2 H. L. 170. (2) 5 D. M. & G. 76, 90. (3) 3 Ch. D. 351, 357.

STIRLING J. carefully exercised, and the facts in each case must be closely scrutinised to see which way the equity lies. The mistake was made upon the occasion of the Divorce Court dealing with the petition to vary existing settlements. The power so to deal is derived from the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, which provides that, "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." It will be observed that the Court has by this enactment merely power to deal with "the property settled"; it has no power under the enactment to deal with any property which is not the subject of the settlement. Now the petition was presented, and the registrar's report and the Order of Court were made upon the assumption that all the plaintiff's property was subject to the trusts of the settlement of 1877. As I have said, I think that this assumption was not well founded, and that the funds then subject to the trusts did not include, at all events, the 18,500*l.* which have not yet reached the trustee's hands. However, the report and order only deal in terms with the funds comprised in the settlement. It appears to me clear that neither Mr. Kell, nor the plaintiff, nor the Court intended to deal with any funds not so comprised, or to make a new settlement. The income of the 25,000*l.* admittedly comprised in the settlement is amply sufficient to provide the annual sums of 300*l.* and 150*l.* directed to be paid by the order of April 24, 1894; and if the case rested there, I should be of opinion that nothing had happened to deprive the plaintiff of the right to relief, at all events as regards the 18,500*l.* The case, however, does not rest there; under a previous statute of 1857 (20 & 21 Vict. c. 85), s. 45, it is provided that, "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife" (which is the present case), "if it

1896  
ALLCARD  
v.  
WALKER.  
—



shall be made appear (1) to the Court that the wife is entitled STIRLING J. to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them." It is obvious that if the plaintiff had, in the course of the proceedings on the petition to vary the settlement, set up the case raised in the present action, Mr. Kell and his son would have asked the Court to exercise the jurisdiction conferred by this last-mentioned statute; and it is quite possible that Mr. Kell might have obtained something more than an allowance of 300*l.* a year, and the Court might have required a further settlement to be made for the benefit of the son. Now, if the result of the common mistake was to prevent the exercise by the Divorce Court of the jurisdiction conferred by the Act of 1857, it would appear to me that it would be inequitable to relieve the plaintiff from the mistake. If, on the other hand, justice can still be done, it would seem to me that the equity would be in favour of the plaintiff. I speak with the greatest possible diffidence as to the practice of the Divorce Court in these cases, with which I am entirely unfamiliar; but inasmuch as that Court has never exercised, or been called on to exercise, the jurisdiction conferred by the Act of 1857, I do not at present see why that Court should not be able to apply it. But I think that the matter ought not to be left in any doubt, and it is in my power to impose proper terms on the plaintiff coming here for equitable relief. In my judgment, therefore, to prevent any difficulty, it would be right as a term of such relief that the plaintiff should be put on an undertaking that any application to the Divorce Court for a further settlement out of the funds to which this action relates shall be dealt with by that Court in all respects as if the application had been made before April 24, 1894, and were being considered by the Court as on that day. If this undertaking be given, I think the plaintiff's title to relief in respect of the 18,500*l.* still outstanding is made out.

(1) *Sic* in the Act.

STIRLING J. It remains to consider whether there are any special circumstances which affect the funds which came to the trustee's hands after the decree nisi. The cases of *Wilkinson v. Gibson* (1) and *Prole v. Soady* (2) appear to me to shew that Mr. Kell's right to deal with the plaintiff's property ceased when the decree nisi was made. After that time, nevertheless, funds to the amount of over 10,000*l.* were paid over to the trustees of the settlement of 1877 with the knowledge of the plaintiff, who in some cases at least gave written consents to particular investments of those funds. All this, however, took place under the same common mistake and ignorance on the part both of the plaintiff and of Mr. Kell and their son as to their existing rights. I am unable to see that any rights of third parties have intervened, or that anything else has happened to preclude the plaintiff from relief if in other respects she is entitled to it, and it seems to me that upon the same undertaking as before relief ought to be given. The frame of the judgment will require a little consideration. I propose in the first place to make declarations substantially in accordance with those in the statement of claim; but, as regards the first, I think it ought to run thus: A declaration that the investments and cash mentioned in paragraph 11, and now held by or in the hands of the defendants as trustees as if subject to the said post-nuptial settlement, came to the hands of the said defendants under a mistake, and in ignorance by all parties of the existing rights and interests therein, and that they were and are not bound by the said settlement, but are in equity the absolute property of the plaintiff. Then I think the second and third are correct. After those declarations, I propose to insert this: "But these declarations are to be without prejudice to any application which the defendants, the two Messrs. Kell, or either of them, may see fit to make to the Probate, Divorce, and Admiralty Division of the Court for a settlement for the benefit of them, or either of them, of the property to which such declarations relate or any part thereof; and the plaintiff is to undertake that any such application shall be dealt with by the said Division in like manner in

(1) L. R. 4 Eq. 162.

(2) L. R. 3 Ch. 220.

all respects as if the same had been made before April 24, 1894, STIRLING J. and was being considered by that Court on that date." Then, as regards the directions to be made with respect to the funds, those, if given now, will not of course take effect until an opportunity has been given to the Messrs. Kell, or either of them, of making the application which I have suggested. It will not be unreasonable, I think, that a period of six weeks or two months should be allowed for that purpose. I suppose it would be better to make an order directing a transfer of the funds subject to that—of course, not to come into operation before the period which may be agreed upon. If there is any difficulty about that, of course liberty to apply could be given.

1896  
ALLCARD  
v.  
WALKER.

Solicitors: *Seaton F. Taylor; Mander & Watson; B. H. Van Tromp.*

G. A. S.

*In re* DE HOGHTON.  
DE HOGHTON *v.* DE HOGHTON.

STIRLING J.

[1876 D. 229.]

1896  
March 18;  
May 16.

*Power—Construction—Jointure—Portions.*

Primâ facie, a jointure is an estate to the wife for life to take effect on the death of the husband.

*Jamieson v. Trevelyan* (10 Ex. 269) explained.

A testator devised his real estates in strict settlement, subject to a trust for the accumulation of the rents and profits for a period of twenty-one years from his death, and he empowered every person becoming tenant for life under the will by deed or will (1.) to appoint a rent-charge for any wife for her life or any less period; (2.) to charge the devised estates with portions in favour of younger children; (3.) to charge the said estates in the meantime with an annual sum not exceeding 4 per cent. interest upon the expectant portions of the children for their maintenance and education, such powers to take priority over the trust for accumulation. The first power was referred to in the will as a power of jointuring, and followed the form in Davidson's Conveyancing Precedents save for the omission of the words "by way of jointure." The second and third powers conferred on the donee an absolute discretion as to the mode and time of payment:—

*Held*, (1.) that the first power did not authorize an appointment to a wife to take effect in the lifetime of her husband; (2.) that the third power authorized an appointment of interest by a father in favour of his

STIRLING J.

1896

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In re

DE HOGHTON.

DE HOGHTON

v.

DE HOGHTON.

infant children to be made payable to himself as their guardian, and that such an appointment was not invalidated by the fact that the father had the means to support his children.

THIS was a summons taken out by Sir James de Hoghton, Bart., in an action for the administration of the estate of Sir Henry de Hoghton, deceased, to determine the validity of certain appointments purported to be made by Sir James de Hoghton in favour of his wife and children under a deed of revocable appointment of July 26, 1895, in pursuance of the powers of jointuring and of charging portions and interest thereon contained in the will of Sir Henry de Hoghton.

Sir Henry de Hoghton, Bart., by his will dated February 9, 1875, devised his real estates being freeholds of inheritance to trustees for a term of 500 years, to commence from the testator's decease, and subject thereto he settled the estates in strict settlement upon a series of his brothers and half-brothers for life, with remainder to their first and other sons in tail male. The principal trusts of the term were to pay to the person who for the time being should subject to the term be entitled under the will to the receipt of the rents and profits of the devised estates an annuity varying in amount from 1000*l.* to 3000*l.* a year, according to the age of the recipient, and to accumulate the surplus rents and profits for a period of twenty-one years for the purpose of being invested in real estate to be settled upon the same uses. And the will contained a power of jointuring in the following terms: "Provided always and I hereby declare that it shall be lawful for every male person hereby made tenant for life of the hereinbefore devised estates either before or after he shall under or by virtue of this my will be entitled to the possession or to the receipt of the rents and profits of the said estates (subject and without prejudice to the uses and estates preceding the estate of the persons for the time being exercising this present power, and to the powers annexed to such preceding uses or estates, and to the uses or estates limited in exercise of those powers yet so that any exercise of the present power shall take effect in priority to and so as to supersede pro tanto the trust for accumulation for the period of twenty-one years from my death hereinbefore

contained) by any deed or deeds with or without power of revocation and new appointment, or by will or codicil to appoint to any woman whom he may marry or have married for her life or for any less period any yearly rent-charge or yearly rent-charges not exceeding in the whole for any one such woman the yearly sum of 1000*l.* to be charged upon and payable out of all or any of the said premises hereinbefore devised"; and after providing for the manner of payment and the means of enforcing payment "of the same rent-charge or rent-charges respectively" the testator continued: "And I hereby declare that the said power of jointuring may be exercised as often as any person for the time being entitled to exercise the same shall marry. Provided always and I hereby further declare that no rent-charge which may be appointed under the power lastly hereinbefore contained shall become a lien upon any of the premises or be payable unless either the person appointing shall be or become entitled to the possession or the receipt of the rents and profits of the premises or some issue of such person shall or if of full age would become so entitled but for the purpose of this proviso this my will shall be construed as if the said term of 500 years had not been limited therein." The will also contained powers of charging portions and interest thereon in the following terms: "Provided always and I hereby declare that it shall be lawful for every person hereby made tenant for life of the hereinbefore devised estates either before or after he or she shall under or by virtue of this my will for the time being be entitled to the possession or to the receipt of the rents and profits of the said estates and either before or after his or her marriage by any deed or deeds with or without power of revocation and new appointment or by will or codicil (but subject and without prejudice to the uses and estates preceding the estate of the person for the time being exercising this present power and to the powers annexed to such preceding uses or estates and to the uses or estates limited in exercise of such powers yet so that any exercise of the present power shall take effect in priority to and so as to supersede pro tanto the trust for accumulation for the period of twenty-one years from my death hereinbefore contained) to

1896
In re
 DE HOGHTON.
 DE HOGHTON
v.
 DE HOGHTON.

STIRLING J. charge all or any part of the said premises hereinbefore devised
1896 with the payment of any sum or sums not exceeding in the
In re different events hereinafter specified the different sums herein-
DE HOGHTON. after mentioned as and for the portion or portions of his child
DE HOGHTON or children or any one or more exclusively of the other or
v. others of his or her children other than a first or only son
DE HOGHTON. entitled under or by virtue of this my will to the first estate of
inheritance of the same premises." The testator then enumerated the several sums which were to be payable as portions in various events, the amounts varying according to the number of the children, and he declared that those interests were to be "vested in and to be payable unto or among such child or children or any one or more exclusively of the other or others of such children at such age or time ages or times in such manner and if more than one in such shares and to be subject to such powers of appointment by the person for the time being exercising this present power or any other person or persons and to such provisions for the maintenance education and advancement of any such child or children at the discretion of any trustees or trustee or otherwise and to such other powers and provisions for the benefit of such child or children or some of them as the person for the time being exercising this present power shall in manner aforesaid direct, and by the same or any other deed or deeds or by will or codicil (but subject and without prejudice as aforesaid) to charge the premises charged with such portion or portions respectively with the payment of any annual sum or sums of money not exceeding what the interest of the sum or sums of money so charged for a portion or portions would amount to after the rate of 4*l.* per cent. per annum to be applied for or towards the maintenance or education of the child or children for whom the portion or portions charged as aforesaid shall be intended in the meantime until such portion or portions shall become payable the said annual sum or sums of money to be clear of all deductions and to commence from such period or periods and to be raised and paid and applied in such proportions at such times and in such manner as the person for the time being exercising this present portion shall in the manner aforesaid direct."

The testator died on December 2, 1876, so that the trusts for STIRLING J. accumulation under the 500 years' term were still in force. The present baronet, Sir James de Hoghton, succeeded to the baronetcy on April 12, 1893, and became entitled, as tenant for life under the will subject to the trusts of the term, to an annuity of 3000*l.* a year. Sir James de Hoghton had, in 1878, married Aimée Jean Grove, by whom he had several children. By an indenture of settlement made in contemplation of such marriage on June 26, 1878, Sir James de Hoghton, in pursuance of the powers of jointuring and charging portions contained in the will of Sir Henry de Hoghton, appointed to his intended wife for life, in case she should survive him, a yearly rent-charge of 1000*l.* for her jointure, and in bar of all dower and freebench, payable quarterly, the first of such quarterly payments to be made at the end of the three months after his death, and charged portions in favour of the younger children of the marriage to the full extent allowed by the will, to be payable in the case of sons at the age of twenty-one, and in the case of daughters at that age or marriage, if the same respectively should happen after the death of Sir James de Hoghton, but if in his lifetime, then immediately after his death.

By a supplemental indenture of July 26, 1895, Sir James de Hoghton purported, in pursuance of the powers contained in the will, to appoint to Lady de Hoghton during their joint lives a yearly rent-charge of 1000*l.*, to be charged upon the estates devised by the will, to be payable by equal quarterly payments, the first of such payments to be made at the end of three months next after the date of the indenture; and, in further pursuance of the powers of the said will, he purported to charge the estates thereby devised with the payment from and after the date of the indenture for the maintenance and education of every child of the marriage for the time being entitled in expectancy to a portion under the principal indenture of such annual sum or sums of money as should amount to 4 per cent. interest per annum on the expectant portion of such child, to be paid to Sir James de Hoghton as the guardian of such children during his life; and the deed contained a power of revocation and new appointment. Sir Henry de Hoghton, who

1896
In re
 DE HOGHTON.
 DE HOGHTON
v.
 DE HOGHTON.

STIRLING J. had by an order made in the action on June 12, 1893, been appointed receiver of the rents and profits of the freehold, copyhold, and leasehold estates of the testator, now took out this summons asking that he might be at liberty, pursuant to the provisions of the above deed, to pay thereout to his wife the said annual sum of 1000*l.* by equal quarterly instalments, commencing on October 26, 1895; and in like manner, as guardian of his six younger children therein mentioned, to retain for their maintenance the annual sum of 400*l.*, being 4 per cent. per annum on the sum of 10,000*l.*, the expectant portions of the said children.

1896

In re

DE HOGHTON.

DE HOGHTON

v.

DE HOGHTON.

Hastings, Q.C., and *Ingle Joyce*, for the summons. The appointment to the wife in the deed of 1895 is a good appointment, and takes effect from the date fixed in the deed. The power in the will is a power to grant a rent-charge, and is not expressed to be by way of jointure. But, assuming it to be a power to jointure, still the appointment of a rent-charge, even by way of jointure to the wife for life, may take effect in the lifetime of the husband: *Jamieson v. Trevelyan*. (1) The fact that there has been a previous exercise of the power does not affect the validity of the appointment, as it is immaterial whether a power is exercised by one deed or several, provided that the aggregate executions do not exceed the limits of the power: *Zouch v. Woolston* (2); *Hervey v. Hervey*. (3)

T. T. Methold, for the infant children, in support of the application. The definition in 27 Hen. 8, c. 10, s. 6, of a jointure which shall bar dower includes an estate to the wife for life to take effect immediately: see *Ashton's Case*. (4)

Buckley, Q.C., and *Rowden*, for one of the persons entitled in remainder. The intention of the testator was to enable the husband to make provision for his widow and children after his death. The power of jointuring is copied almost verbatim from the form given in Davidson's Conveyancing, vol. iii. pt. ii. p. 1054, except that the words "by way of jointure" are omitted; but the testator in the next clause refers to the power

(1) 10 Ex. 269.

(3) 1 Atk. 560.

(2) 2 Burr. 1136.

(4) Dyer, 228 a.

as "the said power of jointuring." Upon the construction of this STIRLING J.
 will there is no power to enable the husband to appoint to the 1896
 wife during his life. A jointure is an estate which takes effect In re
 for the benefit of the wife after the death of the husband: DE HOGHTON.
 Bacon's Abridgment, tit. "Dower and Jointure," vol. 2, p. 744; DE HOGHTON
 Sugden on Powers, 8th ed. p. 484; Davidson's Conveyancing, v.
 vol. iii. pt. i. p. 478. *Jamieson v. Trevelyan* (1) merely decided DE HOGHTON.
 that the context in the instrument containing the power of
 jointuring may be such as to deprive the word "jointure" of
 its ordinary meaning: see Sugden on Powers, p. 484, note.
 On the face of this will it is highly improbable that the testator,
 in addition to the 3000*l.* given to the husband, intended to
 empower the husband to give to his wife an additional 1000*l.* a
 year during his lifetime.

With regard to the point as to successive appointments, it is
 not denied that successive appointments might be made under
 certain circumstances; but the power is "for her life or for
 any less period"; and it is submitted that the husband, having
 once chosen a period, cannot by a subsequent deed of appoint-
 ment fix another period.

With regard to the appointment to the children, the powers
 of granting portions and interest thereon in this will are in the
 common form, and are intended to take effect on the death of
 the parent, and not to relieve the parent from the duty of
 maintaining his children when he has the means: *Hughes v.*
Hughes. (2)

Hastings, Q.C., in reply.

[STIRLING J. intimated that the appointment by way of
 jointure was not void by reason of a previous appointment
 having been made to take effect at a different period.]

With regard to the interest on the portions, s. 43 of the Con-
 veyancing Act, 1881, has altered the policy of the Court.

For the purpose of construing this power the Court will not
 take into consideration the fact that the father is alive or able
 to maintain his children, but evidence can if necessary be
 produced as to the propriety of the appointment.

Cur. adv. vult.

(1) 10 Ex. 269.

(2) 1 Bro. C. C. 387.

STIRLING J. May 16. STIRLING J., after stating the facts and referring to the will of Sir H. de Hoghton, continued :—The question raised on this summons is whether the appointments contained in this deed of July 26, 1895, are valid, and whether effect ought to be given to them by the trustees of the 500 years' term. First of all, as regards the jointure. That turns, of course, on the construction of the power contained in the will of Sir Henry de Hoghton. The power is in what I may call the common form—in fact, with one exception it is almost verbatim in the form given in Davidson's *Precedents of Conveyancing* as the precedent of a jointuring power. [His Lordship read the power, and continued :—]

1896
In re
 DE HOGHTON.
 DE HOGHTON
v.
 DE HOGHTON.

The point in which it differs from the common form is that the words which are ordinarily inserted, "by way of jointure," are omitted. It is not stated to be "by way of jointure." But the testator afterwards refers to the power as "the said power of jointuring." It seems to me to be clear on the face of the will that this power of creating a rent-charge in favour of the wife is a power of jointuring, and it is really immaterial that the common words "by way of jointure" are omitted.

The question then arises, what effect or meaning is to be given to the word "jointure," which I find in the will in the way I have mentioned? What is a jointure? I think, according to the common acceptation of the word both popularly and by legal writers, it means a provision made for the wife after the death of the husband. I will refer to some of the text-writers in order to shew that. First of all, I will go back to Lord Coke. He says at p. 36 *b* this: "By the Statute of 27th Hen. VIII., if a joynture be made to the wife, according to the purview of that Statute, it is a barre of her dower, so as the woman shall not have both joynture and dower, and to the making of a perfect joynture within that Statute sixe things are to be observed. First, her joynture by the first limitation is to take effect for her life in possession or profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate." The other points I need not mention.

In Blackstone's *Commentaries*, vol. ii. p. 137, there is this

statement: "A jointure, which strictly speaking signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke,—‘a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least.’” The same definition is to be found in Bacon’s Abridgment, vol. ii. p. 744. In another book which is very accurate, namely, Burton’s Compendium, 8th ed. at p. 125, I find this: “Before the Statute of Uses, the use or equitable estate was subject neither to curtesy nor to dower. Hence settlements upon marriage became necessary; of which the most simple form was to make the husband and wife joint tenants, that the whole might go to the survivor. This seems to be the origin of the word ‘jointure,’ as applicable to the provision made for a woman upon marriage in the event of her husband’s death; though it has been more usual, as being more secure, to make this provision by way of remainder, expectant upon a life estate in the husband.” Lastly, in Sugden on Powers, 8th ed., at p. 484, Lord St. Leonards, in speaking of jointuring powers, says this: “Jointures, like leases, will supersede all the estates in the settlement which would prevent the jointress from taking her jointure upon the death of her husband, which is the period at which it should arise.” I take it, therefore, *primâ facie*, that a jointure is a provision for the wife after the death of her husband.

It is, no doubt, true that the word is not necessarily confined to a provision only to commence at the death of the husband. In the case of *Jamieson v. Trevelyan* (1), which was relied on for the applicant, it was held that the power of jointuring might be exercised by giving an estate to commence in the lifetime of the husband; but that case was a very remarkable one. There, by a will made in 1818, the testator devised to his son an annuity of 300*l.* issuing out of certain land for his life, payable quarterly; and, by a codicil of even date, he declared that, in case his son should marry, it should be lawful for him, if he should think proper, to settle an annuity of 300*l.* upon the

(1) 10 Ex. 269.

1896
In re
 DE HOGHTON.
 DE HOGHTON
v.
 DE HOGHTON.

STIRLING J. woman he might happen to marry for her life by way of jointure, to be charged upon the said real estate in like manner as the annuity or rent-charge of 300*l.* devised to his son; and that, in case his said son should so settle an annuity, it should be by way of substitution for the annuity given to him by the will; and that, immediately on such substitution and settlement of the said annuity, the annuity given by the will should cease. After the testator's death the testator's son married, and, in exercise of the power given by the will by a deed-poll, settled and appointed an annuity of 300*l.* a year by way of jointure on his wife, declaring the same to be charged on the testator's estate in like manner as the former annuity was charged by the will. There it was held that the words "by way of jointure" in the codicil could not postpone the wife's annuity till after the husband's death. In the course of the argument, when it was urged that it was only to commence at the death of the husband, Pollock C.B. said this (1): "That construction of the testator's intention is, to say the least of it, a highly improbable one—I may say, an impossible one. A person wishing to provide for his son, gives him an annuity of 300*l.* with the power of settling it upon his wife, annexing a condition, that, in case he should make such appointment, the new annuity shall be in substitution of that given to the son, which annuity is wholly to cease and determine. It would be but a poor substitution for an annuity of which the son is in the present enjoyment, if the effect of the arrangement were to deprive him of his annuity. The question then is, whether, in the face of such an improbable construction, the word 'jointure' necessarily means a provision for a woman after her husband's death." Then Alderson B. says (2): "The term 'jointure' may mean an estate to the wife, to commence either before or after the death of her husband. The testator gave his son an annuity, and something more; but, according to the plaintiff's argument, the son by the power given to him would have less. If the testator had given his son the power to appoint an estate to his wife of 500*l.* a year, payable to her on his death, in substitution of that which he had of 300*l.* a year payable in præsent, the argument would

(1) 10 Ex. 277.

(2) 10 Ex. 278.

be more plausible." I have read these short passages from the STIRLING J. argument instead of reading the longer judgments, because they appear to me to express the substance of what is said in the judgments. The ground on which it appears to me that the Court in that case came to the conclusion that the power was properly exercised by giving a jointure by a limitation of the rent-charge to commence at once in the lifetime of the husband was the peculiar language of the will and codicil which the Court had to construe.

1896
In re
 DE HOGHTON.
 DE HOGHTON
v.
 DE HOGHTON.

It appears to me that that view is borne out by the authority of Lord St. Leonards in a note to the passage I have already read, where he says this: "But a power of substituting a wife as an annuitant for her husband who had a present interest for life enables the gift of an immediate interest to the wife, although the power expresses it to be 'by way of jointure': *Jamieson v. Trevelyan* (1), a case too clear for argument." It evidently was the opinion of Lord St. Leonards that *prima facie* a jointure meant a provision to commence at the death of the husband. I think that that is the *prima facie* meaning of the words; and the question is whether there is anything in this will to give it another meaning. I think not. It seems to me that the context is against any such notion. When the testator has carefully limited the interest during the period of twenty-one years of the successive tenants for life to annuities, it would be a great surprise to him to find that he had authorized a payment to be made to the wife of an additional sum of 1000*l.* a year. I think, therefore, that the exercise of the power, so far as it relates to the jointure contained in the deed of 1895, cannot be given effect to.

Then comes the question as to the interest on the portions provided for children. Now here the power of charging portions and the power of giving interest on them are in the widest possible terms. [His Lordship read the powers and continued:—]

With regard to the validity of this appointment two questions are raised, first, whether it is within the language of the power, and, secondly, whether effect ought to be given to it, regard being had to the fact that it is an appointment by

STIRLING J. the donee of the power in favour of himself as guardian of the children. It is to be observed that the deed of 1895 is revocable, and one may anticipate that at the expiration of the period of twenty-one years the appointor, Sir James de Hoghton, would proceed to revoke the power of appointment and leave himself in full possession of the income of the property. Both points deserve serious consideration. In coming to a conclusion upon them I am guided by the law as laid down in the Court of Appeal in the case of *Henty v. Wrey*. (1) There the question arose, not on a power to appoint interest, but on a power to appoint portions. The appointment was made in favour of the children of the appointor who were infants without regard to the ordinary practice of providing that it should not take effect unless the child attained twenty-one, and the question arose as to the validity of the appointment. It was there held, notwithstanding some doubt had been raised by prior cases, that the appointment was good. That does not bear directly on the present case; but the result of the authorities is summed up by Lindley L.J. thus in his judgment (2): “(1.) That powers to appoint portions charged on land ought if their language is doubtful to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is before they attain twenty-one or (if daughters) marry. (2.) That where the language of the power is clear and unambiguous, effect must be given to it. . . . (5.) That appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.” I think that these principles apply to the present case. First of all, as regards the language of the power, it does seem to me that the power I have read is expressed in language which is clear and unambiguous, and that the appointment which has been made by the deed of July 26, 1895, falls within the terms of the power.

(1) 21 Ch. D. 332.

(2) 21 Ch. D. 359.

As regards the other point, that Sir James de Hoghton is himself obtaining a benefit under it, I think that the last principle laid down by Lindley L.J. applies, and that a small amount of evidence would be sufficient to invalidate the appointment. But the Court ought not to act without evidence, and upon the materials before me I cannot say that the appointment is invalid. It may be a question whether the Court ought to give effect to it without further inquiry. Certainly appointments of this kind deserve close scrutiny at the hands of the Court; but I was informed at the hearing that Sir James de Hoghton was prepared to adduce evidence that the exercise of the power was beneficial, and indeed necessary, in the interest of the infants. I think that the evidence ought to be supplied, and, subject to that evidence being supplied, effect ought to be given to that portion of the appointment. The costs of all parties will be costs in the action.

1896
In re
 DE HOGHTON.
 DE HOGHTON
 v.
 DE HOGHTON

Solicitors: *Rowcliffes, Rawle & Co.*; *Park Nelson & Co.*

H. B. H.

In re LLOYD AND THE NORTH LONDON RAILWAY (CITY BRANCH) ACT, 1861. STIRLING J.

Railway Company—Compulsory taking of Land—Payment of Purchase-money into Court—Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 80, 82. 1896
March 26, 28;
May 19.

Leaseholds, which stood limited by will to one for life, and subject thereto to a class of children and grandchildren of the testator absolutely, were, during the life tenancy, taken compulsorily by a railway company and the purchase-money paid into court. On the death of the tenant for life the fund, which was divisible into eleven shares, was ordered to be distributed. All the original legatees and the executors had died since the payment into court, and, for the purpose of obtaining payment out, letters of administration were taken out to the estates of all the deceased beneficiaries:—

Held, following *Ex parte Kelly* (31 L. R. Ir. 137) and *Ex parte Rorke* ([1894] 1 I. R. 146), that the company must pay the costs of taking out the letters of administration.

ADJOURNED SUMMONS.

The testator, who died in 1858, by his will gave certain leasehold hereditaments to his wife for life, with remainder to M. A.

STIRLING J. Lloyd for life, with remainder to Elizabeth Frost for life (she died in the lifetime of M. A. Lloyd), and subject thereto to his children and the children of a deceased daughter absolutely.

1896
In re
 LLOYD
 AND NORTH
 LONDON
 RAILWAY
 (CITY
 BRANCH)
 ACT, 1861.

In 1867 the North London Railway Company took the property under their compulsory powers and paid the purchase-money into court, taking a conveyance from M. A. Lloyd, who was the tenant for life.

On November 23, 1868, on a petition to which M. A. Lloyd and the executors of the will were parties, an order was made for the investment of the fund and payment of the dividends to the tenant for life.

On August 24, 1892, M. A. Lloyd died, and the fund then became divisible into eleven shares. The executors of the testator, as well as all the original legatees, had died after the payment into court, and in March, 1895, an order was made for the distribution of the fund amongst the legal personal representatives of the deceased legatees, and for the payment of costs by the company in accordance with the provisions of the Lands Clauses Consolidation Act, 1845.

In taxing the costs the taxing master allowed (1.) the costs of obtaining letters of administration de bonis non to the estate of the testator, and (2.) the costs of obtaining letters of administration to the estates of the deceased persons beneficially interested in the fund. The company objected to these allowances, and took out this summons to have the certificate of the taxing master varied.

Hastings, Q.C., and *R. F. Norton*, for the railway company. The costs of taking out administration to the estates of all these deceased beneficiaries were improperly allowed by the taxing master. The company are only liable to pay costs incurred in consequence of their having taken the property: Lands Clauses Act, 1845, s. 80.

In *In re Brooking* (1), which was decided on a section nearly identical in terms with s. 80, the company was held liable to pay the costs of a deed which was rendered necessary by the taking of the land; but in the present case if the company had

not taken the land administration would have had to be taken out to the estates of these persons before their representatives could have obtained the property. All these beneficiaries died after the land had been taken; it was not, therefore, a question of title at the time the company took it. There are two Irish cases which seem to support the view taken by the taxing master: *Ex parte Kelly* (1) and *Ex parte Rorke* (2); but in both these cases the deaths had occurred before the company took the land, and the letters of administration were plainly required for the purpose of making a title. The cases are only intelligible on that footing. The land was taken in 1867, and in the same year a petition was presented and an order made for the payment of the dividends to M. A. Lloyd. The executors then assented to the bequest of the leaseholds. It was clearly, therefore, unnecessary to take out administration de bonis non to the estate of the original testator. The railway company were present and objected to it as unnecessary.

In *In re Liverpool Improvement Act* (3) the company were held liable to pay the costs of taking out letters of administration which they considered necessary for the purposes of their title; but that is very different to a case like the present. The punctum temporis at which the rights of the parties become crystallized is the date of the payment into court. Where costs are rendered necessary by the money being in court no doubt the company must pay them.

Sheldon, for the respondents. If a railway company take land from persons under liability and pay the purchase-money into court they are burdened with all costs incidental to obtaining payment out. Costs of inquiries, which would have had to be made in any event, have been held payable by the company: *In re Singleton's Estate*. (4) The company must pay all costs except those of adverse litigation: *Re Gregson's Trusts*. (5) The true principle is that all costs of administration of the fund must be paid by the company: *In re Bareham*. (6) It is well settled now that where the money is in court the persons

1896
In re
 LLOYD
 AND NORTH
 LONDON
 RAILWAY
 (CITY
 BRANCH)
 ACT, 1861.

(1) 31 L. R. Ir. 137.

(2) [1894] 1 I. R. 146.

(3) L. R. 5 Eq. 282.

(4) 9 Jur. (N.S.) 941.

(5) 2 H. & M. 504.

(6) 17 Ch. D. 329.

STIRLING J. entitled to the fund are not to be estopped from dealing with it, and the company must pay all costs occasioned by its being in court: *In re Brooshooft's Settlement* (1); *In re Olive's Estate*. (2) These letters of administration would not have been required if the money had not been in court. The two cases decided in Ireland are indistinguishable.

1896
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*In re*  
 LLOYD  
 AND NORTH  
 LONDON  
 RAILWAY  
 (CITY  
 BRANCH)  
 ACT, 1861.

*Hastings, Q.C.*, in reply.

[STIRLING J. The company are entitled to take a title from the tenant for life, and I have difficulty in seeing why, under s. 82, they should pay the costs of subsequent administrations; and I should feel the same difficulty as to s. 80 if it were not for the Irish cases, but I will consider the point.]

*Cur. adv. vult.*

May 19. STIRLING J. (after stating the facts). The amount involved is small, but it is said that the question is one of importance to railway companies.

As regards the costs of obtaining letters of administration to the estate of the original testator, I cannot see how these are chargeable against the company. The bequest of the leaseholds must be treated as assented to by the executors, from November 23, 1868, when the dividends were, with the assent of the executors, ordered to be paid to the tenant for life, if not from an earlier date. The letters of administration were obtained before the proceedings which resulted in the final order of March, 1895, were commenced, and I do not see how they assisted in the obtaining of that order. I think, therefore, that those costs must be disallowed.

There is more difficulty as to the costs of obtaining letters of administration to the estate of the deceased beneficiaries. Sect. 80 of the Lands Clauses Consolidation Act, 1845, throws on the company "the costs of the following matters including therein all reasonable charges and expenses incident thereto. . . . that is to say . . . the costs of obtaining the proper orders . . . for the payment out of court of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto."

(1) 42 Ch. D. 250.

(2) 44 Ch. D. 316.

The question then is whether the costs of obtaining these letters of administration are charges and expenses "incident to" the obtaining the order for the payment out of court. Certainly the order could not be obtained without them. It is said, however, that they would have been equally necessary if the leaseholds had never been taken by the railway company. The answer made is that this consequence does not necessarily follow; because the persons beneficially entitled might have been able to enter into possession and obtain payment of the rents without ever being called upon to perfect a legal title; and the Irish cases of *Ex parte Kelly* (1) and *Ex parte Rorke* (2) were cited in support of the contention. It seems to me that the former case does decide the point. There money was paid into court by a railway company under the Lands Clauses Consolidation Act, 1845, in respect of leasehold premises. Persons claiming under the marriage settlement of their father, then deceased, applied for payment, but the Court decided that other children, then dead, and of whom there were no personal representatives, had taken vested interests, and declined to pay out the fund until administration had been taken out to their estates. One of the applicants thereupon took out administration to the deceased children, and obtained payment of the fund. It was held that the company should pay the costs of obtaining those administrations.

The Vice-Chancellor there said (3): "The 80th section of the Lands Clauses Act, under which payment was applied for, enacts that it should be lawful for the Court to order the costs of the several matters there enumerated, 'including therein all reasonable charges and expenses incident thereto,' to be paid by the promoters of the undertaking; and among the matters so enumerated are the costs of the orders for payment of the dividends, and for the payment out of court of the principal of such moneys and of all proceedings relating thereto, except such as are occasioned by litigation between adverse parties . . . . The costs in question relate to the obtaining the order for payment and not to the making out of title to the premises acquired

1896  
*In re*  
 LLOYD  
 AND NORTH  
 LONDON  
 RAILWAY  
 (CITY  
 BRANCH)  
 ACT, 1861.

(1) 31 L. R. Ir. 137.

(2) [1894] 1 I. R. 146.

(3) 31 L. R. Ir. 140.

STIRLING J. by the company. By paying the sum awarded into court the company did not need to have title made out to the premises, but when the parties entitled to the money applied for the order for payment they were not entitled to get it till they had acquired a legal title to the money. For this purpose, and only for this purpose, were these administrations taken out by them. It would be hard then to say that the costs and charges of doing so were not incident to the obtaining payment, or that the obtaining the administrations were not proceedings relating thereto. If the company, instead of bringing in the money, had persevered in requisitions on the abstract of title, the taking out of these administrations would have been necessary, and should have been paid for by the company."

The second case is less directly in point, because the Master of the Rolls decided it on special circumstances (1), he says: "I do not propose to lay down any general rule applicable to all cases. I decide this case on its own facts." But he also says (2): "I do not see any hardship in construing s. 80 of the Lands Clauses Act, 1845, as it has been construed in the cases in this country, and in England, which have been referred to by counsel. It must be remembered that an owner of property may be quite content to remain with his title as it is, and may not care to make it better. But if his land is taken from him compulsorily he has to go further, and must shew at least something more than a holding title." And he followed the decision of the Vice-Chancellor in the former case.

I am not sure that in the absence of these authorities I should have come to the same conclusion, but it is very desirable that the practice should be the same in both countries, and I therefore follow the Irish Courts; and accordingly I shall, as regards the letters of administration taken out to the beneficiaries, uphold the decision of the taxing master.

Solicitors: *Burchell & Co.*; *Sanderson, Holland & Co.*

(1) [1894] 1 I. R. 150.

(2) [1894] 1 I. R. 152.



BATTISON *v.* HOBSON.

STIRLING J.

[1866 B. 193.]

1896

April 23, 25,  
28;  
May 21.

*Mortgage—Priority—Registration—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 7, 14—Deposit of Deeds—Solicitor and Client—Notice—“Actual Fraud.”*

The Yorkshire Registries Act, 1884, applies to a charge by deposit of deeds unaccompanied by a memorandum of deposit.

The priorities given by the Act are not to be altered except in cases of actual fraud, which means fraud importing grave moral blame.

In 1889 certain beneficiaries under a will deposited with a bank the title-deeds of an estate in Yorkshire to secure an overdraft by the trustees in order that the trustees might be guaranteed against loss in carrying on the testator's business. This was done with the knowledge and approval of J., a solicitor, who represented one of the trustees in this matter. The charge was never registered. J. subsequently took a mortgage of the same property and registered it, and he claimed priority over the bank. The bank, being satisfied with the personal security of the trustees, did not contest the claim:—

*Held*, that J. was guilty of actual fraud in taking advantage of a defect in the bank's security to defeat the interests of his client, and that he was not entitled to the protection of the Act.

THIS was a summons taken out in an action for the administration of the estate of Frederick Hobson by one of the executors of Evan Thomas, deceased, formerly a trustee of the will of the said Frederick Hobson, to determine the priority of certain charges claimed respectively by the National Provincial Bank and Theophilus Edward Jones over a sum of 1384*l.* 8*s.* 4*d.* deposited in the Leeds branch of the said bank, being the proceeds of the sale of property situate at the Leylands, at Leeds, and formerly belonging to J. G. Metcalfe and J. M. Buckley, deceased.

All the parties interested were desirous that this question of priority should be decided upon this summons and upon the materials before the Court, and they submitted to be bound by the order of the Court.

The will of Frederick Hobson, the testator in the action, was proved in 1863, and judgment for the administration of the trusts of the will was given in 1866. On July 10, 1883, Mr.

STIRLING J. Evan Thomas, Mr. William Pybus Horne, and Mr. Frederick Miers were appointed trustees of the will, and on August 2, 1884, conduct of the proceedings was given to them. The main part of the trust property consisted of a newspaper known as the *Leeds Times*, the business of which was carried on at Leeds by the trustees under trusts contained in the testator's will in that behalf. For the purposes of carrying on this business 2000*l.* was borrowed by the trustees, with the sanction of the Court, upon a mortgage of the premises in Leeds, where the paper was printed and published.

1896  
BATTISON  
v.  
HOBSON.  
—

In the year 1888 much discussion took place between the trustees and their beneficiaries as to the propriety of reducing the price of the newspaper to 1*d.* These beneficiaries consisted of three families. Mrs. Metcalfe, the wife of the Rev. James Galloway Metcalfe, and her children; Mrs. Buckley, the wife of James Mordaunt Buckley, and her children; and Mrs. Minors and her children. Mr. Paley, as mortgagee of Mrs. Minors' share, was also interested in the question. Of these parties Mrs. Metcalfe and Mrs. Buckley and their respective husbands were strongly in favour of the proposed reduction, while Mrs. Minors and her mortgagee declined to have anything to do with it. On June 12, 1888, a meeting was held of those of the beneficiaries who were favourable to a change being made in the price of the paper. The meeting was attended by Mr. Horne, one of the trustees, Mr. Hopps, a member of the firm of Hopps & Bedford of Leeds, who acted as solicitors for Mr. Horne and also for Mr. and Mrs. Metcalfe, Mr. T. E. Jones, who acted as solicitor for Mr. Buckley and also for Mr. Evan Thomas, Mr. Buckley, and Mr. Metcalfe. Mr. Thomas was represented at this, as at all other meetings of the trustees and beneficiaries, by Mr. Jones, who acted as his solicitor in this matter until his (Mr. Thomas's) death and was one of the executors of his will. According to the minutes of the proceedings, the accuracy of which was not in dispute, it was explained that this meeting was convened at the wish of Mr. Buckley and Mr. Metcalfe and the parties who expressed a wish to carry on the *Leeds Times* business and join in a scheme to provide capital for that purpose, and that the other parties

interested—namely, Mrs. Minors, Mr. Paley, and Mr. Miers—STIRLING J. had not been invited. After referring to a discussion upon a report as to the financial position of the newspaper, from which it appeared that a net sum of 2483*l.* 11*s.* would be available for carrying on the business when the outstanding accounts could be got in, and that a capital of 1250*l.* was required to enable the paper to be carried on at the reduced price of 1*d.*, the minutes stated “that it was suggested and thought expedient by the meeting that on this state of accounts evidence should be carried in before the chief clerk of the facts shewn by the above figures, and that without resorting to such outstanding accounts there was no capital fund wherewith to carry on. That in the scheme to carry on it should be sanctioned that a capital of 1250*l.* should be raised by a charge on the said outstanding assets represented in the sum of 2483*l.* 11*s.*, and that such capital sum be raised by an overdraft on the bank on security of such charge, the said Buckley and Metcalfe undertaking also, as a further security to the bank, to deposit deeds of freehold property belonging to them situate in Leeds with a joint charge on such property to the extent of 1000*l.*, the interest and expenses attending such overdraft to be debited against the *Leeds Times* business.”

At the conclusion of this meeting, Mr. Hopps handed to Messrs. Metcalfe and Buckley a letter signed in the name of the firm, Hopps & Bedford, which was headed “*Battison v. Hobson*,” and was as follows:—

“As we understand Mr. Paley refuses on behalf of his client, Mrs. Minors, to find any part of the capital necessary for the purpose of issuing the *Leeds Times* newspaper at the reduced price of 1*d.* as sanctioned by the Court, we shall be pleased to know if you are willing to lodge at the bank your title-deeds of certain property in the Leylands, Leeds, which we understand you are entitled to as tenants in common, subject to your respective wives’ dowers therein, in order that the trustees under the will of the late Frederick Hobson, deceased, may be guaranteed against loss in continuing the business of the said testator. We think, if you are agreeable to give this guarantee (say to £1000), the Court will give you a first charge on the

1896  
BATTISON  
v.  
HOBSON.  
—

STIRLING J. net profits of the business, and please say what interest you are  
1896 willing to accept on any overdraft on your guarantee, and let  
BATTISON us have your reply as soon as possible, so that we can embody  
v. in the schedule to be filed in court your willingness to be  
HOBSON. responsible for 1000*l*."

To this Messrs. Buckley and Metcalfe replied, agreeing to lodge the deeds with the bank upon the terms proposed.

At this date the property in question was vested in Mr. Hopps as trustee for Messrs. Buckley and Metcalfe in equal shares as tenants in common, and the title-deeds were in his hands. An application was shortly afterwards made to the Court to sanction the scheme, and the Court gave its sanction by an order of July 18, 1888, whereby it was ordered (*inter alia*) "that the trustees be at liberty to borrow from their bankers, the Leeds branch of the National Provincial Bank of England, on the security of the testator's estate, and of the guarantee of the defendants, J. G. Metcalfe and J. M. Buckley (which guarantee the said defendants by their counsel undertake to give) a sum not exceeding 1300*l*. at a rate of interest not exceeding 5 per cent. per annum"; and by the same order the trustees were to be at liberty to apply the money borrowed in effecting the alterations in the management of the newspaper, and were ordered to repay the money so borrowed in sums not exceeding 150*l*. a year. Nothing was said in the order as to the nature of the guarantee to be given by Messrs. Buckley and Metcalfe. On August 9, 1888, another meeting took place, at which there were present Mr. Horne, Mr. Hopps, Mr. T. E. Jones, who again represented Mr. Evan Thomas, Mr. Metcalfe, and Mr. Buckley. At this meeting the minutes of June 12 were read and considered by the chairman, Mr. Horne; the letters of Messrs. Metcalfe and Buckley of June 12 were also read; and Mr. Hopps himself reported the arrangement he had made for depositing the deeds with the bank, and opening and drawing on an overdraft account at the bank, and these arrangements were approved by those present. On September 1, 1888, the title-deeds were deposited with the bank by Mr. Hopps. No memorandum of deposit was executed by anybody, nor was any legal mortgage given. The overdraft



account was opened on the same day, and subsequently drawn upon. The newspaper was continued on the new footing down to August, 1889, but, having proved unsuccessful, the business was then sold by order of the Court, and a balance of 1288*l.* still remained due to the bank. In the meantime, on March 19, 1889, Mr. Jones took a mortgage from Mr. Buckley of his moiety of the Leylands property to secure a present advance of 300*l.* and further advances.

On March 21, 1889, this mortgage was duly registered in the Wakefield Registry. The total advances made by Mr. Jones amounted to 600*l.*, and the whole of that sum was still owing, together with arrears of interest. Mr. Buckley had since died in insolvent circumstances, and the Leylands property had by arrangement between all the parties interested been sold, and the proceeds paid into the bank to a separate account. Mr. Jones, having registered his mortgage of March 19, 1889, claimed priority over the equitable mortgage to the bank. In support of his claim, he alleged, first, that the arrangement of June 12 had been withdrawn by Messrs. Metcalfe and Buckley shortly after it had been made; secondly, that the letters of that date were given in consideration of a payment by the trustees to beneficiaries of 400*l.*, which payment was never made; thirdly, that the arrangement was put an end to by the order of July 18, 1888, which pointed to a personal guarantee only; fourthly, that, before taking the mortgage of March 19, he inquired of Mr. Hopps if any security on the property had been given to the bank, and received the answer, "No." These allegations were, however, denied, and were inconsistent with subsequent letters of Mr. Jones, and especially with a letter of May 6, 1890, in which he recognised the existence of the arrangement of June 12, and stated that he had offered to do all that was necessary to carry it out, and they were held to be not proved.

Mr. Jones further alleged in his affidavits in support of his claim that the mortgage of March 19 was taken after an interview with Mr. Thomas, when the whole matter was discussed, and with his full knowledge and approbation. But the Court held that it was not proved that Mr. Thomas had consented to the postponement of the charge in favour of the bank.

1896  
BATTISON  
v.  
HOBSON.  
—

STIRLING J. *J. Bryn Roberts*, for the summons. Jones has been guilty of actual fraud, and he is therefore deprived of any priority he would otherwise have acquired under the Yorkshire Registries Act, 1884 (1), through having registered his mortgage.

1896  
BATTISON  
v.  
HOBSON.

*Addison McLeod*, for the National and Provincial Bank, stated that the bank were satisfied with the personal security of the trustees, and were content to leave the question of priority in the hands of the Court.

*Hastings, Q.C.*, and *Adams*, for the surviving trustees. It is well settled that the object of the Yorkshire and Middlesex Registration Acts of the reign of Queen Anne was to protect

(1) The Yorkshire Registries Act, 1884, is entitled "An Act to consolidate and amend the law relating to the registration of deeds and other matters affecting lands and hereditaments within the North, East and West Ridings of the county of York."

By s. 3, "the expression 'conveyance' includes any assignment, appointment, lease, or settlement made by deed on a sale, mortgage, demise, or settlement of any land, or appointment of a new trustee in respect thereof, which has been executed by one or more of the parties by whom any interest in such land is thereby conveyed."

"The expression 'mortgage' includes any charge on any land for securing money or money's worth, and any transfer of a mortgage."

"The expression 'memorandum of charge,' shall include any memorandum of a lien or charge on any land which may be registered under the provisions of this Act."

"The expression 'assurance' shall include any conveyance . . . memorandum of charge . . ."

Sect. 7: "Where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money, or by reason of any deposit of title-deeds, a memo-

randum of such lien or charge, signed by the person against whom such lien or charge is claimed, may be registered by any person claiming to be interested therein." The section then stated the requirements of such memorandum, and concluded as follows: "And no such lien or charge shall have any effect or priority as against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum thereof has been registered in accordance with the provisions of this section."

Sect. 14: "Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof: . . . All priorities given by this Act shall have full effect in all courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud . . ."

honest transactions, and not to encourage fraud; and the Act of 1884, which is a consolidating as well as an amending Act, was not intended to change this policy. This may be inferred from the fact that the Legislature has reproduced the exact language used by the judges in the interpretation of the earlier Acts. A mortgage by deposit of deeds, unaccompanied by a memorandum of deposit, has been held not to be included in the earlier Acts: *Sumpter v. Cooper* (1); and it is submitted that it is not within the provisions of the present Act. It is not within s. 7, because that section relates only to charges accompanied by a memorandum; and it is not within s. 14, because that section deals only with priorities between assurances, and a mortgage by deposit of deeds unaccompanied by a memorandum cannot be said to be an assurance capable of registration under that section. An assurance must be something printed or written—something, at any rate, visible to the eye. Assuming this charge to be within s. 7, that section provides that an unregistered charge shall not of itself have any priority over a subsequent registered assurance; but it leaves untouched the question of notice, which still remains to be dealt with by the Courts: see *White v. Neaylon* (2), a decision under a Colonial Registration Act. Assuming it to be also within s. 14, the only effect of that section is that notice, in the absence of actual fraud, is no longer an answer to a claim to priority by registration. The section first provides that effect shall be given to the priorities conferred by the Act, except in the case of actual fraud, and it then goes on to say that the priorities shall not be affected by actual or constructive notice except in the case of actual fraud, the inference being that the notice itself may amount to actual fraud. The section merely intended to exclude actual notice where the party claiming priority had no personal knowledge at the date of registration of any prior increase, as, for instance, where a person is affected by notice through the knowledge of his solicitor, which is, nevertheless actual notice: *Rolland v. Hart* (3); or where he has been informed of an incumbrance the existence of which he has

1896  
BATTISON  
v.  
HOBBSON.  
—

(1) 2 B. &amp; Ad. 223.

(2) 11 App. Cas. 171.

(3) L. R. 6 Ch. 678, 681.

STIRLING J. forgotten. But that there may be notice amounting to fraud is well settled by cases under the previous Registration Acts :  
 1896  
 {  
 BATTISON  
 v.  
 HOBSON.  
 —

*Blades v. Blades* (1) ; *Le Neve v. Le Neve*. (2) The distinction between actual notice which amounts to fraud, and actual notice which does not, is well illustrated by *Rolland v. Hart*. (3)

Apart from the question of notice, the evidence establishes a case of actual fraud against Jones.

*Younger*, for Metcalfe. The Act of 1884 was intended merely to embody the law as it existed before ; it was not intended to alter the law at all except by s. 15, which declared that registration should be deemed to constitute actual notice ; but that section was repealed by s. 5 of the Amendment Act, 1885 (48 & 49 Vict. c. 26).

The expressions used in s. 14 are identical with the language used by the judges in *Jolland v. Stainbridge* (4) and *Wyatt v. Barwell* (5), and that section was not intended to go beyond those cases. [He also referred to *Benham v. Keane*. (6)]

*R. Hughes*, for Jones. The Act of 1884 was intended to alter the policy of the Legislature. A deposit of deeds without a memorandum stands on the same footing as a vendor's lien. Neither the one nor the other was included under the earlier Acts because there was no instrument capable of being registered : *Kettlewell v. Watson* (7) ; but s. 7 applies to both, and that case has no longer any authority : Smith's Yorkshire Registries Acts, 1884 and 1885, p. xii.

Under the earlier Acts a registered deed was postponed by direct notice of a prior unregistered instrument ; but s. 14 makes registration the absolute test of priority, and expressly abolishes the old equitable doctrine : Dart's Vendors and Purchasers, 6th ed. pp. 961, 962.

Sect. 15 was repealed because it was found in practice to cast an unreasonable burden upon bankers in their dealings with their customers. Non-registration of a charge is in effect a declaration that the holder does not rely upon that charge.

(1) 1 Eq. C. Ab. 358.

(2) 2 W. & T. 6th ed. pp. 26, 36.

(3) L. R. 6 Ch. 678, 681, 683.

(4) 3 Ves. 478.

(5) 19 Ves. 435.

(6) 1 J. & H. 685, 702.

(7) 26 Ch. D. 501, 507.



Jones was entitled to believe that the bank did not rely upon STIRLING J. the deposit of deeds ; and this belief was in fact well founded, inasmuch as the bank have preferred to rely upon the personal security of the trustees. No actual fraud is proved against Jones, and he is therefore entitled to the protection conferred by the Act.

1896  
BATTISON  
v.  
HOBSON.

*Roberts*, in reply. It is immaterial whether the bank relied on their security or not, as the security was given mainly to relieve the trustees.

*Cur. adv. vult.*

May 21. STIRLING J., after stating the undisputed facts, continued :—The question to be determined is whether Mr. Jones's mortgage, having been registered, takes priority over the security created by deposit of deeds with the bank. Before dealing with the question of law which arises, I must consider certain issues of fact raised by the parties. [His Lordship then discussed the evidence, and came to the conclusion of fact that the deeds were deposited with the bank by way of security in accordance with the letters of June 12, 1888, and that on March 19, 1889, Mr. Jones was aware of the fact, and he continued :—]

As the law stood down to a very recent period, this finding of fact would have been sufficient to dispose of the case on two grounds. First, it was held under the Registration Acts of the reign of Queen Anne that the provisions of those Acts did not apply to equitable mortgages simply created by deposit of deeds unaccompanied by any memorandum. That was decided in *Sumpter v. Cooper*. (1) Moreover, under the doctrine established by the well known case of *Le Neve v. Le Neve* (2), the security of the bank must have had priority over that of Mr. Jones, who took his security with full knowledge of its existence. It is, however, contended that this state of the law has been altered by the Registration Act of 1884, and it is necessary to consider that Act. [His Lordship then referred to the definitions of "conveyance," "mortgage," "memorandum of charge," and "assurance" in s. 3, and to s. 7, and continued :—]

It was contended that the words "such lien or charge" in

(1) 2 B. & Ad. 223.

(2) 2 W. & T. 6th ed. pp. 26, 36.

STIRLING J. the concluding part of the section meant a lien or charge accompanied by a memorandum, such as is referred to in the prior part of the section. It does not seem to me that this is the true construction of the section. I think that the words "such lien or charge" have the same meaning as the words "any lien or charge" in the earlier part of the section, namely, a lien or charge on lands within the three ridings in respect of unpaid purchase-money, or by reason of a deposit of title-deeds. I think that the object of that section was to alter the law as laid down in *Sumpter v. Cooper* (1), and to deprive equitable mortgages by deposit of priority over any registered assurance for valuable consideration unless a memorandum thereof has been registered under the Act. [His Lordship then referred to s. 14, and observed that "assurance" included any memorandum of charge, and that that term, "any memorandum of charge," extended to any memorandum of a lien or charge which could be registered under the Act, and he continued as follows:—]

I am far from saying that questions may not arise on the construction of this section; but it does seem to me that the Legislature has twice over anxiously provided that the priorities given by the Act are not to be altered except in cases of actual fraud, and I certainly am not disposed to fritter away the language of the Act. "Actual fraud" I understand to mean fraud in the ordinary popular acceptance of the term, i.e., fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a court of law or a court of equity. At all events, for the purposes of the present case I assume that to be so, and I must give effect to the priority claimed by Mr. Jones unless I can come to the conclusion that his case is brought within that exception.

Now, what was the position of Mr. Jones at the time when he took his security from Mr. Buckley? He was not merely solicitor but confidential agent for Mr. Evan Thomas in all matters relating to this particular trust. Mr. Thomas never attended any of the meetings relative to the trust affairs, but was on all occasions represented by Mr. Jones, and he has

(1) 2 B. & Ad. 223.

since shewn the extent of the confidence which he reposed in STIRLING J. Mr. Jones by appointing him one of his executors.

It appears to me that at the time when Mr. Jones took his mortgage from Mr. Buckley he had taken on himself the duty of actively protecting the interest of Mr. Evan Thomas in connection with this trust. Had, then, Mr. Evan Thomas any interest in the security to the bank? The security was, no doubt, a security given to the bank, and the bank were the persons primarily interested in it; but it is really a matter of indifference to them, as is manifest by the position which they take up on the present occasion. They have got the personal security of the trustees, which is perfectly adequate, and they leave it entirely to the Court to say whether the priority exists or no. Then comes the question, Have the trustees as such any interest in this security? I think plainly they have. The meaning of the whole arrangement was that the trustees should be guaranteed against loss by means of this deposit, and that is expressly so stated in Mr. Hopps' letter of June 12, 1888, where he says: "The deposit is to be in order that the trustees under the will of Mr. Hobson may be guaranteed against loss by continuing the business of the testator." I think, therefore, that Mr. Evan Thomas had an interest in this mortgage. What, then, would be the duties of an agent who had taken upon himself the duty of actively protecting his principal Mr. Evan Thomas's interests with reference to the mortgage? It would be this: if he discovered that the security in which his principal was interested was not duly perfected, so that some third party might possibly defeat it, he ought to do his best to get it perfected so as to prevent such defeat. That was his duty. Then could he, behind the back of his principal, himself take advantage of such a defect and get a security for himself so as to defeat, pro tanto at any rate, the security of his principal? Certainly it appears to me that that would be not only a breach of duty, but an actual fraud. The agent was bound to abstain from taking or using any security over property charged in favour of the bank to the prejudice of his principal without making full disclosure and obtaining the sanction of that person, and the burden of proving that such a disclosure was

1896  
BATTISON  
v.  
HOBSON.  
—

STIRLING J. made, and that such sanction was given, lies on the agent.

1896  
BATTISON  
v.  
HOBSON.  
—

Upon that point I refer to *Dunne v. English*. (1) Then what passed between Mr. Jones and Mr. Thomas on this subject? [His Lordship referred to the statements of Mr. Jones with reference to the knowledge and approval of Mr. Thomas of the security of March 19, and held that, inasmuch as Mr. Jones nowhere alleged that he informed Mr. Thomas that he intended to use his security to the prejudice of Mr. Thomas, it was not proved that Mr. Thomas had ever consented to the postponement of the charge in favour of the bank, and he continued as follows:—]

No blame whatever can be attached to Mr. Jones so long as he does not avail himself of the security he has obtained to the prejudice of Mr. Thomas or his estate; but it seems to me that to give effect to the priority which he claims under the Act of 1884 would be to enable him to commit a fraud. This appears from the correspondence to have been the view taken by Mr. Jones himself when Mr. Thomas was alive, and, in my opinion, it is much to be regretted that he should have departed from the view which he then took. In my judgment, therefore, the security of the bank has priority over that of Mr. Jones.

Solicitors: *Jaques & Co., for J. G. Jones, Bangor; Wilde, Moore & Wigston; Bell, Brodrick & Gray; Warren, Murton & Miller, for Tyas & Son, Barnsley; Stuart & Tull, for T. E. Jones, Manchester.*

(1) L. R. 18 Eq. 524.

H. B. H.



## ROBINSON v. HARKIN.

STIRLING J.

[1895 R. 1295.]

1896

May 14, 19;  
June 17.

*Trustee—Breach of Trust—Liability—Right to Contribution or Indemnity as between co-Trustees—Statute of Limitations—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (a), (b).*

The principle established in *Wolmershausen v. Gullick* ([1893] 2 Ch. 514), that the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default. In such a case, therefore, time does not begin to run as between the co-trustees until the claim of the cestui que trust has been established against one of them.

The plaintiff, who was trustee of a marriage settlement, allowed the trust fund to be in the hands of the defendant, his co-trustee, for investment. The defendant entrusted the whole fund to an "outside" stock-broker, who applied a portion of it to his own uses. In an action by the plaintiff and infant cestuis que trust under the settlement, the defendant denied his liability and claimed contribution against the plaintiff trustee:—

*Held*, (1.) that the defendant, not having exercised proper care in the selection of a broker, and having improperly left the whole amount of the trust fund in the broker's hands, was liable for the loss which had occurred; (2.) that the plaintiff was in *pari delicto* with the defendant, and that the defendant was therefore entitled to contribution from the plaintiff; and (3.) that as between the two trustees time did not begin to run under the Statutes of Limitation until the date of the judgment in the action.

## TRIAL OF ACTION.

This was an action by Bernard Robinson, one of the trustees of a settlement made on the marriage of Peter Joseph Keegan with Lucie Foley Duigan, and the three infant children of the marriage, by Bernard Robinson as their next friend, against James Quin Harkin, the other trustee of the settlement, seeking to make him liable for the loss of a portion of the trust funds. The defendant disputed his liability, and in the event of his being held liable he sought by his counter-claim contribution from the plaintiff Robinson. The settlement was dated April 15, 1885, and by it Mr. Daniel Thomas Duigan, the father of Mrs. Keegan, covenanted for payment to the trustees of a sum of 2500*l.*, which was to be invested in the

STIRLING J. Parliamentary stocks or public funds of Great Britain, or on  
1896  
ROBINSON  
v.  
HARKIN.  
— Government or real or leasehold securities in England, or on any debentures or debenture stock or preferential or guaranteed stocks or shares issued or guaranteed by any railway or other public company in England paying a dividend at the time of or within one year previously to such investment upon its ordinary or guaranteed stocks or shares. The investments were to be held upon trust for Mrs. Keegan during her life for her separate use without power of anticipation, and after her death for Mr. Keegan for his life, and after the death of the survivor upon the usual trusts for the children of the marriage. Mr. and Mrs. Keegan were still living, but, so far as their interests were concerned, they had given the trustees a discharge in respect of the alleged breach of trust, and they took no part in this action.

The plaintiff Robinson was, at the date of the settlement, a medical student aged twenty-three, and was now a medical practitioner in the country. The defendant was a wine merchant, having commenced business in 1881, and there was evidence that in 1884 the business of his firm was very small.

Neither of the trustees had at the date of the settlement had any experience in making investments. The plaintiff Robinson had no banking account of any kind; the defendant had no private banking account, but the firm of which he was a member had an account.

The sum of 2500*l.* covenanted to be settled by Mr. Duigan was paid on July 10, 1885, by a cheque drawn to the order of both trustees. It was first sent to the plaintiff Robinson, who indorsed it and forwarded it to the defendant.

On January 14, 1885, Mr. Keegan wrote to the defendant a letter, from which it appeared that the solicitor who had prepared the settlement was desirous of carrying out the investment of the fund, but Mr. Keegan objected to the expense. The letter concluded thus: "I herewith enclose paper signed by Lucie and self saying we wish it invested in North Eastern Railway 4 per cent. preference shares," and he suggested that if the defendant had a stockbroker on his books he should employ him to transact the business. The defendant

acted in accordance with this suggestion. His firm had a customer, named John Record, who was a stockbroker, though not a member of the Stock Exchange; and on the morning after the defendant had received the cheque he handed it over to Record, who gave an acknowledgment, dated July 14, 1885, in these terms: "I beg to acknowledge receipt of cheque 2500*l.*, the amount, less commission, to be invested in such stocks and in such names as may be hereafter advised."

1896  
ROBINSON  
v.  
HARKIN.  
—

Record afterwards made various purchases of Manchester, Sheffield, and Lincolnshire Railway 4 per cent. Preference Stock and Great Eastern Railway 4 per cent. Preference Stock, amounting in the aggregate to about 1500*l.* These investments were made in the sole name of the defendant, but it was not disputed that they were otherwise proper investments, and he had duly handed over the certificates representing the stocks, so that no loss had been thereby occasioned to the trust estate. The balance of the trust fund, however, amounting to 943*l.* 13*s.*, was never invested. Record represented to the defendant that he had made further purchases of Manchester, Sheffield, and Lincoln and Great Eastern Railway Stocks, to the amount of the balance in his hands, and sent him what purported to be the contract-notes relating to such purchases, but he never delivered the stocks, and from half-year to half-year down to September, 1888, he sent to the defendant cheques for the amounts (as he said) of the dividends on the undelivered stocks. After that date nothing was recovered from him in respect of either principal or interest, and various solicitors who were consulted by the trustees advised them that nothing would be got from Record by bringing an action against him, and eventually he became insolvent, and the whole of the 943*l.* 13*s.* was thus lost to the trust estate. The defendant gave evidence to the effect that he did not at the time of employing Record know the difference between "outside" and "inside" brokers. He became acquainted with him through his partner, who had known him for many years. Record was also introduced to him as a customer by a Mr. Mesnard, an accountant, and a mutual friend. He paid his bills promptly when sent in. The defendant went to his office at Warnford Court, and from the

STIRLING J. appearance of his office, where he kept four or five clerks, and the business which was being carried on, he formed the idea that he was worth about 10,000*l*. Mr. Mesnard stated that he introduced the defendant to Record, but did not tell him that he was an outside broker, as the introduction had nothing to do with the Stock Exchange. He declined to express any opinion as to Record's financial position in 1885, but said that he had employed him as a broker, and the business with which he entrusted him had been satisfactorily carried out.

1896  
ROBINSON  
v.  
HANKIN.

*Hastings, Q.C.*, and *C. E. Bovill*, for the plaintiffs. There has been a clear breach of trust, for which the defendant alone is responsible.

*Curtis Price (Grosvenor Woods, Q.C.*, with him), for the defendant. First, we say, there has been no breach of trust for which the defendant is liable.

Secondly, if the defendant is liable to the infant plaintiffs, the plaintiff Robinson is equally liable ; and

Thirdly, if both are liable, then the loss should be borne by them in equal shares, and the plaintiff Robinson is not entitled to throw upon the defendant the whole loss of the 943*l*.

It is said on behalf of the plaintiffs that the defendant is liable on four grounds : (1.) because he employed an " outside " broker ; (2.) because the investments were made in the sole name of the defendant ; (3.) because he paid over the money to the broker en bloc ; and (4.) because he did not take sufficient steps to recover the money from Record. As to the first ground of complaint, we say that the defendant is protected by s. 24 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which provides that a trustee shall not be answerable for the default of any banker, broker, or other person with whom any trust moneys may be deposited. No attempt is made in that section to distinguish between particular classes of brokers. If a trustee selects a broker who is competent to transact the necessary business, then he has discharged his duty. In 1885 the distinction between inside and outside brokers was not so marked and well known as perhaps it is now, and the defendant says that he was not aware of the distinction. No case of



wilful default within the section is made out: *Speight v. STIRLING J. Gaunt*. (1)

Secondly, the investment in the sole name of Harkin did not lead or contribute to any loss, as Harkin has accounted for all such investments.

1896  
ROBINSON  
v.  
HARKIN.

Thirdly, assuming that the broker was a responsible person, it was no breach of trust to place the money in his hands for immediate investment.

Fourthly, the evidence shews that the defendant used every endeavour to recover the money from Record when it became clear that he was in default. Assuming that there has been a breach of trust for which the defendant is liable, then we say that the plaintiff Robinson is equally liable, and he is not entitled to an indemnity from the defendant to relieve him from half the loss: *Lingard v. Bromley*. (2) The defendant is clearly entitled to contribution from the plaintiff Robinson, for the defendant did not derive any personal benefit from the transaction: *Lewis v. Nobbs* (3); and the mere fact that he was the acting trustee does not deprive him of that right: *Bahin v. Hughes*. (4)

*Hastings, Q.C.*, in reply. The defendant did not exercise due care in the selection of a broker: *Speight v. Gaunt*. (1) In order for the defendant successfully to claim contribution it must be shewn that the act which caused the loss was the joint act of the two trustees. In *Lingard v. Bromley* (2) it was a joint act. *Bahin v. Hughes* (4) was a case of seeking for an indemnity, which involves different considerations. The plaintiff Robinson desires to amend the defence to the counter-claim by pleading the Statute of Limitations. As between the plaintiff Robinson and the defendant, s. 8 of the Trustee Act of 1888 is a complete answer: *Re Partington*. (5) The plaintiff Robinson is clearly sued in the counter-claim as a trustee, and is entitled to all the benefits of the section. The period of time from which the Statute of Limitations commences to run is the commission of the breach.

(1) 22 Ch. D. 727; 9 App. Cas. 1,  
10.

(2) 1 V. & B. 114.

(3) 8 Ch. D. 591.

(4) 31 Ch. D. 390.

(5) 57 L. T. (N.S.) 654.

STIRLING J. *Curtis Price*, for the defendant Harkin. If the plaintiff is allowed to amend by pleading the Statute of Limitations, the same leave ought also to be extended to the defendant.

1896  
 ROBINSON  
 v.  
 HARKIN.

*Cur. adv. vult.*

June 17. STIRLING J. (after stating the facts). In my judgment the money was irretrievably lost on September 24, 1888, and the question which I have to decide is whether the defendant, either alone or along with the plaintiff, is answerable for the loss.

The duty of trustees with reference to the investment of trust moneys was considered in *Speight v. Gaunt*. (1)

The late Master of the Rolls in giving judgment in that case said (2):—

“It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, ‘I take all reasonable precautions and all the precautions which are deemed reasonable by prudent men of business, and beyond that I am not required to go.’ Now what are the usual precautions taken by men of business when they make an investment? If the investment is an investment made on the Stock Exchange through a stockbroker, the ordinary course of business is for the investor to select a stockbroker in good credit and in a good position, having regard to the sum to be invested, and to direct him to make the investment—that is, to purchase on the Stock Exchange of a jobber or another broker

(1) 22 Ch. D. 727; 9 App. Cas. 1.

(2) 22 Ch. D. 739.

the investment required. In the ordinary course, all that the broker can do is to enter into a contract—usually it is for the next account-day. Of course you may, by special bargain, make it for cash or for any other day, but the ordinary course is for the next account-day. Before the account-day arrives the purchasing stockbroker requests his principal to pay him the money, because on the account-day he is himself liable to pay over the money to the vendor, whether a jobber or broker, and therefore he must have it ready for the account-day, and according to the usual course of business he sends a copy of the purchasing note to the principal stating when the money is required to be paid, and he obtains the money from him a day or two before the account-day. When he gets it he pays it over, if it is a single transaction, to the vendor, and if it is one of a number of transactions he makes out an account with his vendor and pays over or receives from him the balance on the transactions. It by no means follows, therefore, that he pays over to the vendor the sum received, indeed there may be a number of transactions, and if the balance is the other way, then he has to receive money on the account, but he must in any case have the money in order to keep himself out of cash advances. It is after payment, and very often a considerable time after payment, that is several days, that he gets the securities perfected. If they are shares or stock in a company, or railway or other company, it may be a considerable time before the transfers are lodged at the office, and it is not until the matter is ready for completion that he gets the transfer and the certificates. But in all cases, except in the case of consols and a few other such stocks, there is some interval between the payment of the purchase-money and the obtaining of the security, or of the investment purchased. If, therefore, a trustee has made a proper selection of a broker, and has paid him the money on the bought-note, and, by reason of the default of the broker the money is lost, it does not appear to me in that case that the trustee can be liable.”

Those are the general principles which ought to guide trustees in such cases; but I am not to be understood as saying that in

1896  
 ROBINSON  
 v.  
 HARKIN.  
 —

STIRLINGJ. no case can a trustee escape liability unless he has followed the exact course there indicated.

1896  
ROBINSON  
v.  
HARKIN.  
—

The same view was taken in the House of Lords ; but there are some passages in the judgments of the noble and learned Lords which are very applicable to the present case. Lord Selborne says (1) : “ In the early case of *Ex parte Belchier* (2), before Lord Hardwicke, it was determined that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents ; and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys ; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed ; and, in conformity with it, the statute 22 & 23 Vict. c. 35, s. 31, enacts, that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability ‘ for any banker, broker, or other person, with whom any trust moneys or securities may be deposited.’ Neither the statute, however, nor the doctrine of *Ex parte Belchier* (2) authorizes a trustee to delegate at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which (to use Lord Hardwicke’s words) there is no ‘ moral necessity from the usage of mankind,’ for the employment of such an agency. The cases of *Rowland v. Witherden* (3), *Bostock v. Floyer* (4), and many others, shew, that trustees, bound to invest trust moneys in authorized securities, are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested ; and will not be

(1) 9 App. Cas. 4.  
(2) Amb. 218.

(3) 3 Mac. & G. 568, 574.  
(4) 35 Beav. 603, 606.



exonerated from liability if, in the meantime, they leave them STIRLING J.  
in other hands, though the hands of professional advisers or  
agents, to whose assistance, for many purposes connected with  
the trust, they may properly have recourse."

And Lord Blackburn says (1): "The authorities cited by the  
late Master of the Rolls, I think shew that as a general rule a  
trustee sufficiently discharges his duty if he takes in managing  
trust affairs all those precautions which an ordinary prudent  
man of business would take in managing similar affairs of his  
own. There is one exception to this: a trustee must not  
choose investments other than those which the terms of his  
trust permit, though they may be such as an ordinary prudent  
man of business would select for his own money; and it may  
be that however usual it may be for a person who wishes to  
invest his own money, and instructs an agent, such as an  
attorney, or a stockbroker, to seek an investment, to deposit  
the money at interest with the agent till the investment is  
found, that is in effect lending it on the agent's own personal  
security, and is a breach of trust."

First, then, as to the defendant's liability. He entrusted to  
Record 2500*l.* on the terms of the letter of July 14, 1885. Was  
he justified in so doing? What was the position of Record?  
He was a stockbroker, but not a member of the Stock Exchange.  
It is a matter of common knowledge that outside brokers, as  
they are called, do not enjoy so high a reputation as members  
of the Stock Exchange; still, the evidence does not shew that  
there may not be outside stockbrokers who are of good repute  
in the City of London, and I do not decide the case on that  
ground alone. [His Lordship then considered the evidence as  
to Record's position, and continued:—]

This evidence seems to me to come to little more than this,  
that Record appears to have carried on business as an outside  
broker, and was regarded as a good customer by a firm of wine  
merchants in a small way of business. It certainly does not  
establish the truth of the allegation in the defendant's state-  
ment of defence, that Record was "a person of good credit in  
the City of London as a broker." I think that the defendant

(1) 9 App. Cas. 19.

STIRLING J. failed to exercise proper care in the selection of a broker, and further, that he departed from the usual course of business in depositing with the person selected so large a sum as 2500*l.* for future investment on the terms of the letter of July 14, 1885. In my judgment he has failed to justify the handing over of this sum to Record, and is liable for the loss thereby occasioned. The next question is, What was the plaintiff Robinson's position between July 10, 1885, and September 24, 1888? He said in his evidence-in-chief: "I left the matter of the trust in the hands of the defendant to seek investments. I judged him to be a man of experience in business matters." Therefore, he delegated to his co-trustee the selection of the broker and the care of the money to be invested. In cross-examination he said: "I inquired if he had made investments, and if so in what. I cannot say when. I made inquiries by letter from time to time between July, 1886, and September, 1888. I have no copies of these letters, though I have of subsequent letters. I have none of defendant's replies. I knew that if I bought railway stock I should have to execute the transfer. I executed no transfer before 1888. I must have known no stock had been transferred into my name. I trusted the defendant as to investments up to October, 1888. Up to October, 1888, I can only remember the answer to my inquiries was that defendant was seeking favourable opportunities to buy Great Eastern Railway shares. That was the last reply I can remember that I received to my inquiries." From this evidence it seems plain, on Robinson's own admission, that he was satisfied with the most general answers to his inquiries, and that in truth, for the period of upwards of three years, he left the whole matter in the hands of his co-trustee. Making every allowance for his youth and inexperience, I cannot hold that in reference to this trust he took the same precautions as an ordinary prudent man of business would have taken with regard to his own affairs, and in my judgment the plaintiff Robinson is, as between himself and the infant co-plaintiffs, liable in respect of the loss no less than the defendant.

The question then arises whether the defendant is entitled to contribution from the plaintiff. This subject has been con-

1896  
ROBINSON  
C.  
HARKIN.  
—

sidered by the Court of Appeal in the recent case of *Chillingworth v. Chambers*. (1) All the members of the Court recognise the rule which is formally stated by A. L. Smith L.J. in these terms (2): "As between two trustees who are in *pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other." Lindley L.J. says (3) that this is "established by a long series of authorities, of which it is only necessary to mention *Lingard v. Bromley* (4) and *Bahin v. Hughes*. (5) "

1896  
ROBINSON  
".  
HARRIN.  
—

Both these cases, and particularly the latter, shew that for the purposes of the rule one trustee is treated as in *pari delicto* with his co-trustee, although the latter may have taken the more active part in the conduct of the particular business which led to the loss. [His Lordship then referred to the judgments of the Court of Appeal in *Bahin v. Hughes* (5), and continued :—]

Applying the principles there laid down, I come to the conclusion that the plaintiff Robinson has not made out any case for throwing the entire liability on the defendant. That being so, the general right of the defendant to contribution remains.

It was then said in argument that there was a defence under the Statutes of Limitations, and in particular under the Trustee Act, 1888, s. 8. This defence is not pleaded as it ought to have been, and I was asked, on behalf of the plaintiff Robinson, to give leave to amend by pleading it. This application was met by another on the part of the defendant, that he also might be at liberty to amend his defence by pleading the same statutes as against the plaintiff Robinson. Of course, those statutes would be no defence against the infant co-plaintiffs.

Having regard to the late period at which this defence was first suggested, I confess that I feel considerable difficulty in acceding to the application for leave to amend, and if I did accede to it, I should certainly give the defendant leave to

(1) [1896] 1 Ch. 685.

(3) [1896] 1 Ch. 698.

(2) *Ibid.* 707.

(4) 1 V. & B. 114.

(5) 31 Ch. D. 390.

STIRLING J. amend also. I have, however, considered the question on the merits, and am of opinion that the Statutes of Limitation afford no defence.

1896  
ROBINSON  
v.  
HARKIN.

It was laid down in *Dering v. Earl of Winchelsea* (1) that "Contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it. . . . The reason given in the books is, that in æquali jure the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. Contract is never mentioned." The law was in that case applied between co-sureties; but the principles laid down apply equally to contribution between co-trustees; and it has been held that such right of contribution gives rise to a debt, in some cases in the nature of a speciality, in others of a simple contract: see *Lockhart v. Reilly* (2) and *Priestman v. Tindall*. (3) In the former case one of two trustees was held entitled to the benefit of s. 5 of the Mercantile Law Amendment Act.

The Statutes of Limitation applicable to the recovery of such debts would therefore have been defences to claims in respect of contribution prior to 1888; and consequently it seems to me that the case is not governed by sub-s. 1 (b) of s. 8 of the Act of 1888, but by sub-s. 1 (a). It was held in *Wolmershausen v. Gullick* (4), that in a case of contribution between two co-sureties time did not begin to run under the Statutes of Limitations until the liability of one of the sureties was ascertained—that is, until the claim of the principal creditor was established against that surety. I think that the like principle applies here, and that time does not begin to run as between the plaintiff Robinson and the defendant until the claim of the infant cestuis que trust is established against the latter; and consequently that time only begins to run as between them from the date of the present judgment.

I think, therefore, that I ought to make the following declarations: (1.) that, as between the plaintiffs Keegan on the one hand and the defendant Harkin and the plaintiff Robinson on

(1) 1 Cox, 318, 321.

(2) 1 De G. & J. 464.

(3) 24 Beav. 244.

(4) [1893] 2 Ch. 514.



the other hand, the defendant and the plaintiff Robinson are jointly and severally liable to make good so much of the sum of 2500*l.* as was not expended in the purchase of the several stocks and shares mentioned in paragraph 4 of the statement of claim; (2.) that as between the plaintiff Robinson and the defendant the latter is entitled to contribution from the former.

1896  
ROBINSON  
v.  
HARKIN.  
—

Solicitors: *Clinton & Co.; W. S. Fiske.*

G. A. S.

KEKEWICH

J.

1896

June 18.

## HODSON v. HEULAND.

[1895 H. 2837.]

*Contract—Statute of Frauds (29 Car. 2, c. 3), s. 4—Part Performance—Possession taken before, but continued after, Parol Contract.*

Possession taken before, but continued after, a parol contract for a lease may, if unequivocally referable to the contract, constitute part performance, taking the case out of the Statute of Frauds.

A contract for a lease of land for more than three years was, after negotiation, entered into and reduced into writing in the form of a draft lease, which, however, was not signed by the intended lessor. Shortly before the contract was made, the intended lessee was let into possession, and he subsequently continued in possession and paid rent according to the terms of the draft lease :—

*Held*, that although the entry into possession was antecedent to the contract, yet the subsequent continuance in possession being, under the circumstances, unequivocally referable to the contract, constituted a part performance sufficient to take the case out of the Statute of Frauds.

TRIAL of action for specific performance of an alleged agreement by the defendant to grant a lease of certain premises to the plaintiff.

The premises in question were known as the Royal Hotel Mews, and consisted of stables, coach-houses, buildings, and a yard adjoining the Royal Hotel, Southampton. The defendant was the proprietor of the hotel and mews, and was in the habit of letting the mews to a tenant.

In April, 1895, the mews was without a tenant, and the plaintiff, who was a carriage proprietor and job-master, applied to the defendant to grant him a lease of the mews.

On April 24, 1895, an interview took place between the plaintiff and the defendant, and as the result of that interview the plaintiff, on the following day, wrote a letter to the defendant offering to become tenant of the premises for seven years at a rent of 140*l.* a year.

On April 27, 1895, another interview took place between the plaintiff and defendant, at which Mr. Lomer, who was acting as the plaintiff's solicitor, was present. At that interview the defendant, being unwilling to grant a lease for so long a term

as seven years, declined to accept the plaintiff's offer, but expressed his willingness to grant a lease for the term of three years, and it was arranged that Mr. Lomer should prepare a lease and submit it to the defendant for approval.

It subsequently appeared that a small piece of land, of which the plaintiff desired to become tenant, had not been included in the negotiation, and it was proposed that this piece of land should be included in the tenancy, and the rent increased from 140*l.* to 150*l.*

On April 30, 1895, the defendant let the plaintiff into possession of the premises.

On May 1, 1895, an interview, at which Mr. Lomer was again present, took place between the plaintiff and the defendant. A draft lease of the premises which had been prepared by Mr. Lomer was then produced by him and read to the defendant. The draft lease purported to be a demise of the whole of the premises by the defendant to the plaintiff from the date thereof until June 24 next, and from that date for the term of three years at a rent of 18*l.* 15*s.* for the period ending on June 24, and thenceforth at a yearly rent of 150*l.* The draft lease contained, amongst other clauses and provisions, a covenant by the defendant "to lay out and expend in repairs to the inside of the said buildings hereby demised the sum of 100*l.* at least."

On May 8, 1895, Mr. Lomer sent a fair copy of the draft lease to the defendant, who, on the same day, returned it indorsed thus: "Subject to my alterations I approve this draft. F. Heuland. May 8, 1895." The only alterations made by the defendant were the striking out of the words "inside of the" immediately preceding the words "said buildings hereby demised," and of the words "at least" immediately following "100*l.*" in the covenant above referred to. The first of these alterations was in accordance with what had actually been agreed between the parties. A lease and counterpart were afterwards engrossed, and the counterpart was executed by the plaintiff, but the lease was not executed by the defendant.

The plaintiff continued and still was in possession of the premises, and he from time to time paid rent to the defendant in accordance with the terms of the draft lease.

KEKEWICH  
J.  
1896  
HODSON  
v.  
HEULAND.

KEKEWICH  
J.

1896

HODSON  
v.  
HEULAND.

---

Disputes subsequently arose between the parties, and, the defendant having refused to execute the lease, the plaintiff brought this action against the defendant, claiming (inter alia) specific performance of the agreement for a lease to the plaintiff of the premises contained in the memorandum under the hand of the defendant dated May 8, 1895, and in the alternative for a declaration that a verbal agreement for the grant of a lease of the premises to the plaintiff was entered into by the defendant with the plaintiff on or before May 8, 1895, and that, by reason of the same having been partly performed by the plaintiff, the plaintiff was entitled to have the same specifically performed.

The defendant, by his statement of defence, denied the agreement. He admitted that he let the plaintiff into possession, but denied that he did so under the alleged agreement, and stated that he did so pending the negotiations for an agreement, and as a tenant at will and not otherwise, and he objected that there was no agreement in writing and no part performance referable to any agreement.

Subsequently to the institution of the action the defendant caused a notice to be served on the plaintiff purporting to determine the plaintiff's tenancy of the premises.

On the hearing of the action, the draft lease prepared by Mr. Lomer was put in evidence, and that gentleman was called as a witness and gave evidence as to the circumstances under which the draft lease was so prepared, and that it embodied (with the slight exception above referred to) the expressed intention of both parties.

*Warrington, Q.C.*, and *Elgood*, for the plaintiff. The possession and payment of rent by the plaintiff constitute part performance of the agreement for a lease as contained in the draft, sufficient to take the case out of the Statute of Frauds. It is true that the possession was taken a day or a few days before the contract was made; but it was so taken at a time when the terms of the contract were substantially agreed upon between the parties, and the continuance in possession subsequently to the contract, being unequivocally referable to it, is not the less a part performance because the possession was



taken antecedently: see *Pain v. Coombs*. (1) In *Nunn v. Fabian* (2) a tenant was in possession previously to an agreement for a renewal of his lease, and payment of rent by him according to the terms of the new lease was held to be an act of part performance. In the present case it is, we submit, clear upon the evidence that the continuance in possession and payment of rent were referable to the agreement evidenced by the draft lease.

[They referred also to *Maddison v. Alderson*. (3)]

*Renshaw, Q.C.*, and *Craig*, for the defendant. Possession taken before an agreement cannot possibly be regarded as part performance of the agreement, and the mere continuance of possession so taken cannot be a part performance in the absence of evidence shewing a change in the character of the possession. There is no such evidence here, nor anything to justify the Court in saying that the continuance in possession is unequivocally referable to the agreement.

Then, if the possession does not constitute part performance, it is clear from the judgment of Lord Selborne in *Maddison v. Alderson* (3), and the authorities therein referred to, that the payment of rent cannot do so. *Nunn v. Fabian* (2) is plainly distinguishable. There payment of an increased rent was made by a tenant who had been in possession as tenant at a lower rent, and the payment of the increased rent was, under the circumstances, treated as part performance of an agreement by him to hold at an increased rent. But *Nunn v. Fabian* (2) has been much doubted. In *Humphreys v. Green* (4) Baggallay L.J. (5) expressed his hope that the House of Lords in *Maddison v. Alderson* (3), which was then depending before them, would criticise *Nunn v. Fabian* (2) (which, however, their Lordships did not do), and Brett L.J. expressly dissented from it. The reason why the mere payment of rent does not raise an equity is because the person making the payment would be liable at law for use and occupation.

But, further, as in this case the agreement was for a lease

(1) 1 De G. & J. 34.

(2) L. R. 1 Ch. 35.

(3) 8 App. Cas. 467.

(4) 10 Q. B. D. 148.

(5) 10 Q. B. D. 157.

KEKEWICH J. 1896  
 HODSON  
 v.  
 HEULANI.

for a term exceeding three years, it must, under s. 1 of the Statute of Frauds, have the force and effect of a lease at will only, and neither at law nor in equity can be deemed to have any other force or effect. The tenancy at will so created has been duly determined by notice; and thereby the whole force of the agreement is spent, and there is nothing left of which the Court can decree specific performance.

[They referred to *Goodtitle v. Herbert* (1) and *Right v. Beard*. (2)]

KEKEWICH J. stated the facts, and, after observing that in the evidence of Mr. Lomer he had a clear and succinct account of what took place, continued:—I cannot doubt that in the draft lease, prepared in the way I have indicated, I have before me a perfect expression of the parol agreement between the parties. The question is whether I am at liberty to enforce it. Mr. Renshaw has argued the case mainly on the ground that the payment of rent cannot be regarded as part performance within the doctrine of the Court on that subject. I do not propose to deal with that part of his argument, because I think that there has been part performance by reason of the possession by the plaintiff. He has been in possession, and is in possession now, and the only real difficulty in the case arises from the fact that the agreement, as I have it before me, was certainly not arrived at until May 1, 1895. I think I may say that it was arrived at on that day, because, although I have thought it right to refer to the draft approved by the defendant on May 8, yet, as I have already pointed out, he approved it with two immaterial alterations only. I take it, therefore, that the real agreement was made on May 1. On that day the plaintiff was in possession, having been let into possession on April 30. I do not say that for this purpose the interval of one day is as material as that of a year or a month; but it cannot be doubted that the possession was antecedent to the contract, and that this circumstance presents difficulty. The argument is that the Court cannot regard possession taken antecedently to the contract as being evidence of the contract,

or as letting in the substitution of a parol contract within the doctrine as laid down in all the cases. As regards the doctrine itself, it is sufficient for me to refer to a sentence in the judgment of Sir William Grant in *Frame v. Dawson* (1), referred to by Lord O'Hagan in *Maddison v. Alderson*. (2) "The principle of the cases is," says Sir William Grant, "that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to shew what the agreement is"; and the learned Lord, after citing that passage, adds, "but not till then." I have here to face the difficulty that the possession was taken antecedently to the contract; and it cannot, I think, be doubted that in all the cases the word "antecedent" is used in connection with the contract, or at any rate it is implied that the contract is antecedent to the act of part performance. But it has never, so far as I am aware, been said that continuance of possession cannot be evidence of a contract. The difficulty has been encountered in cases where the Court has been asked to enforce a parol contract for the renewal of an existing lease, and the tenant is, of course, in possession independently of the new lease. It has not, so far as I am aware, ever been said that that circumstance, standing alone, is a fatal objection to the application of the doctrine of part performance, but it is a difficulty which may, and often does, prove insuperable. Lord O'Hagan, in *Maddison v. Alderson* (3), sums up the law on the subject of part performance as follows: "There is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words," in *Gunter v. Halsey* (4), "'as could be done with no other view or design than to perform that agreement.' It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they

KEKEWICH  
J.  
1896  
HODSON  
v.  
HEULAND.

(1) 14 Ves. 387, 388.

(2) 8 App. Cas. 484.

(3) 8 App. Cas. 485.

(4) Amb. 586, 587.

KEKEWICH  
J.

1896

HODSON  
v.  
HEULAND.

are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced." The unequivocal character of the act of part performance is there, as it is in many other decided cases, insisted on. No doubt the fact that the act relied on is a continuance in, and not a taking of, possession makes it difficult to prove the unequivocal character of the act; but if and when that difficulty is surmounted, there can be no reason why the continuance in possession should not have the same force and effect attributed to it as a taking of possession, equally unequivocal, would have. The point of difficulty was raised in the case *Pain v. Coombs* (1) referred to by Mr. Warrington. It does not clearly appear why the question as to possession taken before the parol agreement was started in that case, because the judgment shews that the possession was taken after the agreement, and was accepted as supporting the antecedent agreement. Still, the question was argued, and there is the following summary of the argument (2), which was either that of the late Bacon V.-C. or of the late Giffard L.J.: "The Court will not go beyond the cases already decided in dispensing with the provisions of the Statute of Frauds, and if possession is taken before any agreement is come to, and it should even be proved that a parol agreement was afterwards made, the possession could not be considered a part performance of such an agreement, so as to take the case out of the Statute of Frauds; nor has any case gone to the extent of so deciding." And a little lower down on the same page Knight Bruce L.J. makes this pertinent observation: "Is there any authority for the proposition that the continuance in possession after a parol agreement, or after a variation of a parol agreement, may not be part performance of a contract with reference to the Statute of Frauds? I am not persuaded at present that it may not." That learned judge did not see any objection in point of principle. The difficulty, as I have already endeavoured to explain, is one not of principle but of evidence, and in this particular case it seems to me that the difficulty can be overcome. The evidence shews that

(1) 1 De G. & J. 34.

(2) 1 De G. & J. 46.



both parties were anxious for an early commencement of the tenancy. On April 24, 1895, they were not completely ad idem, and the terms of the contract were subsequently altered, but they had so far come together that there was no reasonable doubt that they intended that there should be a tenancy on some terms. But on April 27 they had got much further, and, but for the difficulty about the small piece of land which was not included, the terms were definitely settled. The alteration made on May 1 was solely in consequence of the addition of the small piece of land, which involved the increase of the yearly rent from 140*l.* to 150*l.* Although, therefore, I am bound to say that on April 27 there was no such agreement between the parties as the Court could be called upon to enforce, yet the parties were so far ad idem that there was every probability that a final agreement would be arrived at. Under those circumstances possession was taken by the plaintiff on April 30, and on May 1 the parties knew that the terms which they had agreed to on April 27 were not the terms upon which the tenancy was to be granted. Surely there is nothing extravagant in saying that the plaintiff, if he did not accept the modified terms of May 1, ought immediately to have given up possession, and that the defendant, if he did not agree to the modified terms, ought immediately to have evicted, or taken proceedings to evict, the plaintiff. It seems to me that the relations of the parties were such that, if they intended to part, the parting ought to have taken place forthwith, and must have done so in the ordinary course of things, and that I am bound to conclude that when the plaintiff continued in possession after May 1 he did so because on May 1 they had come to a definite agreement. I find the plaintiff in possession on May 2; he is either a trespasser or a tenant, either in by wrong or in by right, and I am entitled to inquire which. The answer to the inquiry would be that he is in because the defendant let him into possession on the terms of a contemplated agreement, which was concluded on the following day. Why should I not accept that as an act of part performance so as to give effect to the parol contract? It seems to me that, upon the facts of this case, the initial difficulty is removed, and that I am bound to order performance of this contract.

KEKEWICH  
J.

1896

HODSON  
v.  
HEULAND.

KEKEWICH J.  
1896  
HODSON  
v.  
HEULAND.

In this view of the case, it is not necessary for me to consider the question of payment of rent. Mr. Renshaw has, however, argued that, under s. 1 of the Statute of Frauds, there was created in this case a tenancy at will both at law and in equity, and that, as that tenancy was determined by notice given, the Court cannot order specific performance. But no case has been cited to shew that the doctrine of part performance is not equally applicable to a case of this kind as to other cases to which it has been applied, and it is to be observed that, if that argument is sound, *Pain v. Coombs* (1) ought not to have been decided as it was. That case was decided on the ground that part performance allowed the Court to enforce specific performance of an agreement for a lease for fourteen years if the lessor should so long live, and the point now raised as to tenancy at will does not seem to have occurred to the counsel who argued that case.

I must, therefore, grant to the plaintiff the relief which he asks in the nature of specific performance; and, instead of directing any inquiry, I propose to direct the execution of a lease in terms of the draft lease which has been put in evidence.

Solicitors: *Charles Jupp, for Lomer & Son, Southampton; Speechly, Mumford, Landon & Rodgers, for Charles Lamport, Southampton.*

(1) 1 De G. & J. 34.

## REES v. DE BERNARDY.

ROMER J.

[1895 R. 323.]

1896

*Champerty—Unclaimed Property—Secret Information—Agreement with Heir*  
*—Improvident Bargain—Ratification—Rescission.*

March 30, 31;

April 14, 15;

May 15.

A contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom the information is to be given, and nothing more, is not void for champerty. But if the contract be not merely that information shall be given, but also that the person who gives it and who is to share in what may be recovered shall himself recover the property, or actively assist in the recovery of it, then the contract is against the policy of the law and void, even if the property is in the hands of trustees, or in court, and no hostile action may be necessary to recover it.

A. died intestate having considerable real estate and leaving B. and C. his co-heiresses-at-law, both of whom were advanced in years, illiterate, and of a very humble rank in life. D., having ascertained the heirship of B. and C., induced them to sign an agreement whereby, in consideration of his revealing to them the existence of the property and their title to it (of both which circumstances they were wholly unaware), they agreed to give him one-half of the net amount of the property. At the same time D. verbally arranged to recover the property for them, and induced them to employ his solicitor to act for them in the matter. The property was in the hands of the public trustee in New Zealand, and the title of B. and C. was clear, and no litigation was contemplated. A portion of the proceeds of the property was received and divided on the terms of the agreement. On the death of B. and C. their executors brought an action against D. to have the documents set aside and cancelled:—

*Held*, that the agreement was in the nature of champerty and void:

*Held*, further, that the agreement must be set aside as an improvident bargain which D. had obtained by taking an unfair advantage of his position:

*Held*, also, that there had been no ratification of the contract by B. and C., as they never knew of their right to rescind it.

IN 1863 one W. Howells died intestate in New Zealand possessed of real estate there of considerable value. Prior to 1879 the law of New Zealand as to real estate was the same as in England; but since 1879 real estate in New Zealand, on the death of the owner, descends to and becomes vested in his legal personal representatives. If he dies testate, his executors hold it upon the trusts of his will; but if he dies intestate, the next

ROMER J. of kin are entitled. In 1884 the defendant, a next of kin agent, became aware of the intestacy, and set to work to discover the heir-at-law. At this time the property was in the hands of the public trustee in New Zealand.

1896  
REES  
T.  
DE BERNARDY.

In 1886 the defendant ascertained, as he thought, that the Rev. R. Weston, who was the heir-at-law on the maternal side, was the person entitled to the property, and thereupon he communicated through his firm of Bernardy Brothers with that gentleman; and an agreement was entered into whereby the Rev. R. Weston agreed that in consideration of the information imparted to him the firm were to receive one-third of the property and were to recover the property for him free of expense. The firm then instructed solicitors in New Zealand, and the title of the Rev. R. Weston was made out to the satisfaction of the Court there, and an order was obtained; but when the order came to be drawn up it appeared that all the relatives of the intestate on the paternal side had not been exhausted, and, when endeavouring to do this, the defendant discovered that a Mrs. Walters and a Mrs. York were the co-heiresses-at-law of the intestate on the paternal side. Both these persons were widows, and were over seventy years of age. They were also uneducated, illiterate, and living in very humble circumstances in England. Early in May, 1889, the defendant communicated with Mrs. York and Mrs. Walters, and on May 18, 1889, he had an interview with them, at which he induced them to sign the following document, which he had prepared:—

“ In consideration of your having revealed to us that there is a certain real estate and accumulation therefrom to the whole or part of which we are or may be entitled, we hereby agree, if you will give us such particulars before the end of this month as will enable us to realize the property in question, to pay to you or to your nominee upon such recovery a one-half share of whatever amount may be coming to us or either of us from the sale of such property or from any arrears or accumulations of rent or interest, that is, we are willing to divide equally with you the nett amount that may be coming to us from the source you may reveal declaring as we hereby do that we are unaware of any property due to us or to which we may be entitled.”



The defendant then gave them some information about the property, but did not state the value of it, and produced another document, also prepared by himself, to which he obtained their signatures, and which was as follows:—

“We acknowledge that you have informed us by your letter of this day the property coming to us is that left by our late cousin William Howells who died at Waipawa, New Zealand, on or about November 24, 1863, intestate and without issue, leaving us his co-heiresses-at-law him surviving. We being the only children of William Howells who was the eldest brother of John Howells, the father of our said cousin. Such property consisting of real estate with accumulations therefrom situate in the colony of New Zealand and at present under the charge of the public trustee at Wellington, New Zealand, who in 1883 was appointed by the Supreme Court of that colony administrator of the estate of the said William Howells deceased and who has since received all rents paying to the widow her one-third share of the same. We admit that we were not in possession of these facts previous to your having revealed same to us and we therefore ratify and confirm the letter of agreement signed by us this day, and we hereby charge the proceeds arising from the sale of such property and all accumulations therefrom or any money coming to us from the estate of our said cousin with the payment to you or to your nominee of your one-half part or share.

“As you have now fulfilled your part of the agreement by giving us these particulars we hereby authorize any trustee for the time being or holder of any money coming to us or either of us from the estate of our said cousin to pay over to you or to your nominee a one-half part thereof without further notice from us.”

At the same interview Mrs. York and Mrs. Walters, at the defendant's suggestion, agreed to employ a Mr. Brabant as their solicitor in the matter; and on May 20, 1889, they wrote Mr. Brabant instructing him to take the necessary steps on their behalf.

Mrs. Walters died in July, 1893, and the plaintiff Jane Rees was the executrix of her will. Mrs. York died in November,

ROMER J.

1896

REES

v.

DE BERNARDY.

ROMER J. 1893, and the plaintiffs William York and Joseph York were the executors of her will. Some months prior to the death of the two old ladies some 1800*l.*, representing a portion of the property, had been remitted from New Zealand to Mr. Brabant; and a moiety thereof, after deducting certain costs, was paid to Mrs. Walters and Mrs. York, and the other moiety was paid to the defendant.

1896  
{  
REES  
v.  
DE BER-  
NARDY.  
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In February, 1895, the plaintiffs commenced the present action, alleging by their statement of claim that the documents above set out did not truly represent the transaction, and were merely colourable and framed with the object of avoiding the law against champerty and maintenance; and that the real transaction was that the defendant at his interview with Mrs. York and Mrs. Walters verbally agreed to recover the property for them, and that their costs should be limited to 40*l.*, and induced them to employ his solicitor, Mr. Brabant. The plaintiffs also alleged that Mrs. York and Mrs. Walters had no independent legal adviser, and that the defendant took an unfair and undue advantage of them, and concealed material facts and induced them to enter into an improvident bargain. And the plaintiffs claimed relief accordingly.

The defendant by his defence denied the allegations in the statement of claim, and insisted that the documents represented the true transaction, and contended that the law against champerty and maintenance did not apply, as no action or suit for the recovery of the property or otherwise in relation thereto was pending previously to or at the time the documents were signed, nor was there any agreement by him to commence legal proceedings in relation thereto; nor were any such proceedings in fact ever commenced or contemplated. The defendant also denied that he took any unfair or undue advantage of Mrs. York and Mrs. Walters, or that the bargain was improvident, and alleged that they always acted on the agreement with full knowledge of all their rights. Issue was joined.

The action now came on for trial. The evidence, which was very conflicting, is sufficiently noticed in the arguments and judgment. The property was said to be worth 6000*l.*

*Astbury, Q.C., Griffith Jones, and Whitehouse*, for the plaintiffs. The defendant's suggestion is that he disclosed a secret to the two old women of which they would not otherwise have heard. But that is not true, because they would shortly have received information about it from their cousin, the Rev. R. Weston, had he not promised to keep silence at the defendant's request. The defendant, in fact, was making use of the knowledge he had acquired whilst acting as agent for Weston. The documents signed by the two women are skilfully drawn in the terms of the first count in *Sprye v. Porter* (1), but are merely colourable. On the evidence the real bargain was that the defendant was to recover the property for them, and in fact he really prosecuted their claim and instructed Mr. Brabant on their behalf. The transaction is against the policy of the law, and amounts to champerty and maintenance: *Sprye v. Porter* (1); *Reynell v. Sprye* (2); *Stanley v. Jones* (3); *Hutley v. Hutley* (4); *Strange v. Brennan* (5); Pollock on Contracts, 6th ed. p. 322. Further, the contract must be set aside as an improvident bargain. The old women were at the mercy of the defendant, and did not contract with him on equal terms. He apologised to Weston for charging a commission of one-third when everything had to be done, and yet, when practically everything had been done and the title of these women was clear, he demanded from them one-half. He did not throw round them the protection to which they were entitled, but took an unfair advantage of his position to extort exorbitant terms: *Baker v. Monk* (6); *Clark v. Malpas* (7); *James v. Kerr*. (8) Lastly, the defendant cannot rely on the subsequent events as any ratification of or acquiescence in the contract by the old women, because they always thought they were bound by the contract, and never knew they had any equity to rescind it: *Savery v. King*. (9) The plaintiffs, however, desire to be just, and, if the contract is set aside, they are willing and offer

ROMER J.

1896

REES

v.  
DE BER-  
NARDY.

(1) 7 E. &amp; B. 58, 78.

(2) 8 Hare, 222; 1 D. M. &amp; G. 660.

(3) 7 Bing. 369.

(4) L. R. 8 Q. B. 112.

(5) 15 Sim. 346.

(6) 4 D. J. &amp; S. 388.

(7) 4 D. F. &amp; J. 401.

(8) 40 Ch. D. 449.

(9) 5 H. L. C. 627.

ROMER J. to pay the defendant a reasonable sum for services rendered and expenses incurred.

1896  
 REES  
 v.  
 DE BER-  
 NARDY.

*Neville, Q.C., and G. W. Brabant*, for the defendant. The documents disclose the real transaction. The defendant did not personally undertake to recover the property for them. Brabant was their solicitor in the matter. A transaction such as this is not champerty or maintenance unless there is a certainty or probability of litigation: *Sprye v. Porter* (1); and in all the cases cited, except *Strange v. Brennan* (2), litigation was contemplated. *Strange v. Brennan* (2) was a case of solicitor and client, and is distinguishable on that ground. Here no one had an adverse interest. The title was clear. Litigation was improbable, and there is no case in the books that where there is a vacant estate a contract merely to prove pedigree is champerty, or against the policy of the law. Then as to the contract being an improvident bargain. This was not a case of lending money to an expectant heir, nor of purchasing part of an estate at a gross undervalue, but a selling of valuable information which enured to the benefit of the purchaser. That is the distinction. Here the defendant by merely informing the women of the existence of the property and of their heirship did them a most valuable act of service, and he was entitled to withhold the information until they agreed to compensate him for the communication: *Reynell v. Sprye*. (3) If the contract is set aside, the vendor of the information will be deprived of all his consideration, for the Court cannot make a price for him, and the purchasers will get the property for nothing. That is contrary to the principle of *restitutio in integrum*. Even if the price agreed to be paid is excessive, it is eminently a case for confirmation. The women, though in humble circumstances, were shrewd and alive to their interests. They were told to consult a solicitor, and deliberately choose to employ Mr. Brabant. They acted on the contract and received money under it, and never repudiated it during their lives, and it is too late now for their executors, who are only volunteers, to seek to set it aside.

(1) 7 E. & B. 58.

(2) 15 Sim. 346.

(3) 1 D. M. & G. 665.



*Astbury, Q.C.*, in reply. It is not necessary that litigation should be contemplated in order to bring such a contract within the law against champerty. *Strange v. Brennan* (1) was affirmed on appeal (2), and Lord Cottenham in giving judgment distinctly held that the contract was champerty. Here, at the time the contract was signed, Mr. Weston had not withdrawn his claim, and therefore litigation was not impossible. [He also cited *In re Attorneys and Solicitors Act, 1870* (3); *Jones v. Brinley* (4); *Evans v. Llewellyn*. (5)]

ROMER J.

1896

REES

v.  
DE BERNARDY.*Cur. adv. vult.*

May 15. ROMER J. The plaintiffs are, in my judgment, entitled to succeed in this action. In the first place, looking at the terms of the contract impeached and the circumstances under which the defendant induced Mrs. York and Mrs. Walters to enter into it, I think the transaction is one which a Court of Equity should not allow to stand. With regard to these circumstances there is some conflict of testimony, but on the evidence I hold them to be substantially as follows. At the time when the defendant first approached the two old women the position of affairs, shortly speaking, was this. The defendant some time previously had been under the impression that Mr. Weston was entitled to the property the subject of this action, and had induced him to agree to give one-third of the property recovered after paying costs in consideration of the defendant communicating the particulars of the property and promising to recover it. I say the defendant did this, because, though at first some distinction was attempted to be drawn between him and the firm of De Bernardy Brothers, yet, after the cross-examination of the defendant and the evidence of the solicitor, Mr. Brabant, no distinction can be drawn for the purposes of this case, even if there be a distinction for any purpose whatever. The defendant had nearly succeeded in obtaining the property for Mr. Weston when he ascertained that Mrs. York and Mrs. Walters were the persons really entitled to it, and he thereupon

(1) 15 Sim. 346.

(3) 1 Ch. D. 573.

(2) 2 Coop. temp. Cottenham, 1.

(4) 1 East, 1.

(5) 1 Cox, 333.

ROMER J. determined to try and obtain a contract from them even more beneficial to himself than the one he had obtained from Mr. Weston. But time pressed ; for Mr. Weston, and other relatives of Mrs. York and Mrs. Walters, named Irons and Crabtree, were aware of the position of affairs, and the defendant knew that unless he was very prompt there was every probability of Mrs. York and Mrs. Walters ascertaining their rights without his intervention. So he first obtained from Mr. Weston a promise to abstain from communicating with his relatives until they could be arranged with by the defendant—a promise which, I think, Mr. Weston now much regrets having given. The defendant then hurried down to see Mrs. York at her residence and to try and induce her and Mrs. Walters to promise him a share of the property. He had interviews at first with Mrs. York, and then with Mrs. York and Mrs. Walters. He found them to be poor, with no means of their own, of humble position and illiterate, though shrewd for persons of their age and position. And in my opinion the defendant took an unfair advantage of this condition of the two women, who were then both advanced in years. He represented to them that he knew of certain property belonging to them which they could only ascertain and get the benefit of through him ; and he insisted, as the only terms on which he would tell them the particulars of the property and receive it for them, that they should give him half the property to be recovered ; and, after giving them a very short time for consideration, he induced them to agree to this, and to sign documents to that effect which he took down prepared for signature, and which they only saw on the day they were persuaded to sign them. He did not tell them the large value of the property, though he was aware of it, or that the remuneration he was proposing to get for himself was very considerable, amounting to some thousands of pounds, or that it was far in excess even of what had been promised by Mr. Weston. The two women had no solicitor acting for them in the matter and no adviser except Mr. Mills, the local postmaster and neighbour. The defendant made a show of permitting or asking them to consult a solicitor of their own ; but they had no means of paying a solicitor, or

1896

REES

v.

DE BER-  
NARDY.

any desire to consult one. And the uselessness of Mills as an adviser may be seen from his own statement that he asked the defendant if he was likely to reduce his terms if the women consulted a solicitor, and, on the defendant's saying he should not reduce his terms, Mills said then it would be of no use consulting a solicitor. Under these circumstances it appears to me that the contract made ought not to stand, having regard to the principles acted on in cases of the kind by a Court of Equity, as illustrated by such authorities as *Baker v. Monk* (1), *Clark v. Malpas* (2), and *James v. Kerr*. (3) But it is said that the right to rescind has been lost by the delay of the two women and by their acting on the agreement made and permitting the defendant to receive the half of certain moneys recovered in respect of the property. Now, I take it to be a rule of the Court in cases of this kind, that where a person has once a right to rescind a contract he does not lose that right merely by acting upon it or by delay in impeaching it, so long as he remains in ignorance of his right and the position of parties remains substantially the same. In the case before me the defendant had impressed on the two women and induced them to believe that if they once signed they could never escape from the contract, and I think they remained under that belief during their lives. They never consulted a solicitor nor any one with reference to their right to upset the transaction. The only independent advice they received was from a gentleman with reference to their wills, which the defendant had tried to get them to execute and which, if executed, might have prevented their executors from bringing this action. Moreover, in this case the defendant's position has not been altered by the delay, and certainly he cannot complain of his having received and retained certain moneys under the agreement which he improperly brought about. Lastly, it was urged on behalf of the defendant that the plaintiffs are not entitled now to rescind, because the defendant having once communicated to the women the particulars of the property cannot be restored to his old position. But if that argument was sound it would amount to

ROMER J.

1896

REES

v.

DE BERNARDY

(1) 4 D. J. &amp; S. 388.

(2) 4 D. F. &amp; J. 401.

(3) 40 Ch. D. 449.

ROMER J.  
 1896  
 REES  
 v.  
 DE BER-  
 NARDY.

this, that however gross may have been a fraud which induced a contract, if the contract was one concerning the communication of information by the defrauder, then the Court could never rescind the contract as against him—a proposition which appears to me wholly untenable. If a person as part of a fraud on his part communicates information to the defrauded party, he cannot rely on that as something which in itself prevents the Court from taking from him the fruits of his fraud. The rule as to *restitutio in integrum* is really this, that the person seeking relief by way of rescission cannot succeed if restitution is prevented by his act or default. See, for example, *Phosphate Sewage Co. v. Hartmont* (1), where the contract sought to be rescinded concerned a concession which had become forfeited and could not be restored, and yet the Court, under the circumstances of the case, granted relief by way of rescission. Therefore, in my opinion, this objection on the part of the defendant also fails.

But I think the plaintiffs are also entitled to relief on another ground—namely, that the agreement induced by the defendant is one in the nature of champerty and void as being contrary to the policy of the law. It is not necessary in cases of this kind, in order that the agreement should be held void, that it should amount strictly in point of law to champerty or maintenance so as to constitute a punishable offence: see, amongst other cases, *Reynell v. Sprye*. (2) In that case (3) Knight Bruce L.J., with reference to the agreement there impeached, said: “Such an understanding, such an agreement . . . may or may not have amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, but must in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a Court of Equity ought to discourage and relieve against.” Now, in the case before me I think the true agreement made by the defendant was one contrary to the policy of the law. I agree that a contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered

(1) 5 Ch. D. 394.

(2) 1 D. M. & G. 660.

(3) 1 D. M. & G. 677.



by the person to whom the information is to be given, and nothing more, is not champerty or void : see *Sprye v. Porter*. (1) But if the arrangement come to is not merely that information shall be given, but also that the person who gives it and who is to share in what may be recovered shall himself recover the property or actively assist in the recovery of it by procuring evidence or similar means, then I think the arrangement is contrary to the policy of the law and void : see *Sprye v. Porter* (1), and also *Stanley v. Jones* (2), where the agreement held void was one by Stanley to communicate information to enable the defendant to recover a sum of money and to use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the defendant. And in *Hutley v. Hutley* (3) Blackburn J. says (4), with reference to the contract there held void : “If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal.” Now, in the conflict of testimony before me I have come to the conclusion that the arrangement come to between the defendant and the two women was not merely that the defendant should give information and should for that information alone receive a share of the property recovered. It is true that the defendant, who is skilled in the law of champerty, took care that the documents which he induced the women to sign should on the face of them not shew anything beyond a promise on his part to give information. But I am satisfied that he represented to the women and induced them to believe that he would recover the property for them. And, further, I believe that it was intended both by them and him that he should recover it, and that this was part of the bargain or arrangement come to between them. It is true that the defendant made a show of allowing to be employed any solicitor that the women might name ; but this was a mere farce, and the defendant must have known that the women would as of course allow to be employed the solicitor

ROMER J.

1896

REES

v.

DE, BER-  
NARDY.

(1) 7 E. &amp; B. 58.

(2) 7 Bing. 369.

(3) L. R. 8 Q. B. 112.

(4) Ibid. 115.

ROMER J. he recommended, as they in fact did. This solicitor was one always or usually employed by the defendant in cases like the present. And it is important to consider the terms on which he was to act and did act. The women were not able to pay, and were not to be liable personally for any costs; and the costs to come out of the property were limited to 40%. So far as costs should be incurred beyond the 40%, or should be incurred unsuccessfully, they would have to be borne between the defendant and his solicitor. There seems to have been some general arrangement between the defendant and the solicitor as to his terms for acting in cases like the present. And it is to be observed that the solicitor in his books recognised as his principals in the matter De Bernardy Brothers and no one else, and that the case was treated in his books as only part of the general account between him and that firm. It was suggested that as the defendant knew the law of champerty the probability is he would take care not to break it. But he knew the law equally well when he went to Mr. Weston, and yet he certainly broke it in that case. The defendant probably thought that so long as the written documents on the face of them did not break the law he was safe. What the women understood was the real arrangement between them and the defendant appears from the letter written on their behalf by Mills to Brabant, the solicitor, on May 22, 1889, and in which they say they will not be responsible for any more than what they have signed for with Mr. Bernardy, that is, "to give the one-half for the trouble of getting." I have no doubt this letter was seen by the defendant, and the women were never informed that their view of the arrangement was incorrect. But I feel no doubt that the defendant always intended to see to the recovery of the property by himself and his own solicitor, Brabant, and to have the handling of the proceeds. It would never have suited his views for the proceeds to reach other hands. Besides, we have on record what the nature of the defendant's business is in the letter from De Bernardy Brothers to Mr. Weston of April 10, 1886, where they state "we devote our attention exclusively to the recovery of unclaimed moneys," and offer, if

1896

REES

v.  
DE BER-  
NARDY.

Mr. Weston wished it, to take the necessary steps to recover the property in question at their own risk. The arrangement made in the case before me was in fact, as I believe, one usually made by the defendant, or De Bernardy Brothers. But then it is urged on behalf of the defendant that in the present case the agreement come to was not contrary to the policy of the law because the property was in the hands of a public trustee, and no hostile proceedings to recover it were necessary. But, in my opinion, in a case of this kind the agreement is not the less contrary to the policy of the law because the property is in the hands of trustees or in court, and no hostile action may be necessary to recover it, though, perhaps, the criminal offence of champerty may not have been committed. In the case of *Strange v. Brennan* (1) the property was a fund in the Court of Chancery, and no hostile action was necessary. I ought to add that in that case the agreement was held invalid not merely because the party to take the proceedings was a solicitor, but also on the ground that the agreement was void for champerty. See the judgment of Lord Cottenham on appeal. (2) So in *Sprye v. Porter* (3), the property was an intestate's personal estate in the hands of the Solicitor of the Treasury as a nominee of the Queen, and no hostile action in the true sense could have been necessary. Moreover, in the case before me the proceedings to recover the property might have become of a hostile character, though in ordinary cases apparently the application before the public trustee is *ex parte*. If there were several contending applicants, I presume there would be some way of getting them to interplead. And at the date of the agreement in question Mr. Weston had obtained an order of the Court declaring that he was entitled, and that order had only not been acted on because the registrar had stopped it because he thought the evidence purporting to establish Mr. Weston's claim was insufficient, and Mr. Weston at the time had not abandoned his claim or his right to have that order drawn up. It appears to me, therefore, that this contention on the part of the defendant also fails. I therefore make an order

ROMER J.

1896

REES

v.  
DE BERNARDY.

(1) 15 Sim. 346.

(2) 2 Coop. temp. Cottenham, 3.

(3) 7 E. &amp; B. 58.

ROMER J. that the documents signed by the women shall be cancelled and delivered up to the plaintiffs. And an account must be taken of all moneys and other property recovered by the defendant under or in pursuance of those documents or in respect of the property left by the intestate, William Howells, in the pleadings mentioned. Then, the plaintiffs having offered before me to allow to the defendant such reasonable sum as the Court may think just for his services rendered and expenses incurred in reference to the intestate's property, I direct an inquiry to ascertain what sum ought to be so allowed to the defendant. I adjourn further consideration with liberty to apply, and order the defendant to pay the costs of the action up to and including judgment.

1896  
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REES  
v.  
DE BER-  
NARDY.  
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Solicitors for plaintiffs: *Minshall, Parry-Jones & Co., for Smith, Owen & Davies, Aberystwith.*

Solicitor for defendant: *F. A. Brabant.*

H. L. F.



*In re* MACDUFF.  
MACDUFF *v.* MACDUFF.

[1895 M. 1925.]

*Will—Construction—Legacy—Charitable Bequest—“Charitable, Philanthropic  
or” —Blank in Will.*

A bequest of money "for some one or more purposes, charitable, philanthropic or \_\_\_\_\_," is not bad simply by reason of the existence of the blank, but must be treated as one "for charitable or philanthropic purposes." Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable.

C. A.

1896

STIRLING J.

Jan. 16;

Feb. 26.

C. A.

June 4, 5.

## ORIGINATING SUMMONS.

The Rev. John Ross Macduff, D.D., by his will, which was dated July 22, 1889, and divided into paragraphs, described himself as “formerly minister of Sandyford Church and Parish, Glasgow, but now having my domicile in England and residing at Ravensbrook, Chislehurst, Kent,” and declared that to be his will, “retaining the right to alter or modify or cancel any of the provisions thereof even on my death-bed, as well as to add any codicil or codicils.” The testator next appointed his daughter, Annie Seton Macduff, and two other persons executrix and trustees of his will, and bequeathed to his said daughter all his property and effects of every kind, to enjoy the entire interest therein during her life, with the reservation of several pecuniary legacies and annuities, the amounts whereof were in two or three instances left in blank; and he then left all his property of every description, except what he had thereinbefore specifically disposed of, to his trustees upon trust to pay or provide for his debts, funeral and testamentary expenses, and the legacies and annuities bequeathed by the will, directing that the trust estate should be held in trust for his said daughter, with power for the trustees, in case her income became narrowed or crippled, to appropriate such sums as they deemed proper from the principal for her use and benefit. The testator then proceeded, in paragraph 7, as follows: “The aforesaid provisions or legacies are to come into immediate, or almost immediate, settlement

C. A.

1896

*In re*

MACDUFF.

MACDUFF

v.

MACDUFF.

at my death. The following far more important bequest is for the future, and is retained under the seal of secrecy until my daughter's death, when my aforesaid trustees are empowered to open it. But until that time it is sacredly to be retained by my daughter Annie S. Macduff, the provisions of the same being contingent on her wishes and other private considerations. It contains the bequest of a considerable sum of money for a purpose or purposes which cannot at present be disclosed, and the destination of which may be altered or modified at her discretion, or, failing her, others whose names will be engrossed in this special deed." And the testator gave the ultimate residue of his property of every kind absolutely to his said daughter to be disposed of as she deemed best.

On August 27, 1889, the testator signed a document headed "Special private and contingent bequest embodied at p. 3 (paragraph No. 7) in my will dated July 24, 1889." This document was in the following terms: "As said private and contingent bequests are not to take effect in my daughter's lifetime, but only come into operation at her death, my two trustees mentioned in aforesaid will and settlement are there empowered to open this document and carry its provisions into effect, with any new specification or alteration that may have been resolved on by my daughter and left in her handwriting at the end of these presents. I, John Ross Macduff, will from my estate the entire sum of 10,000*l.*, to be appropriated and allocated for some one or more purposes, charitable, philanthropic or

. The precise purpose or purposes I would desire to be named by my daughter Annie S. Macduff. But should she from any cause fail or be unable to indicate these, I leave the elder surviving sons of my brothers, in co-operation with any others in whose wisdom and experience they can thoroughly rely, to see my wishes carried into effect. I am unable personally to tie myself down to any specific scheme, as many objects supremely claimant to-day may cease to be so after a series of years, while others at present undreamt of may be found urgent." This document was expressed to be "Signed by the said John Ross Macduff, the testator, as and for a special clause and provision made in his will and testament at p. 3, clause 7,"

and it was duly attested as by law required for testamentary provisions.

The testator died on April 30, 1895, and this document was admitted to probate, together with the will and two subsequent codicils, which are not material.

This was an originating summons taken out by Miss Annie Seton Macduff against the two trustees and the Attorney-General in order (inter alia) to have it determined by the Court whether any bequest of 10,000*l.* to take effect on her death was effectually made by the will and codicils of the testator for any charitable or other purposes.

The summons was heard before Stirling J. on January 16, 1896.

*Hadley*, in support of the summons. The only question is as to the construction of the special private document which has been admitted to probate together with the will, and I contend that it does not constitute any valid charitable gift.

The bequest is of 10,000*l.* for some one or more "charitable, philanthropic or" unnamed purposes. The choice is not conjunctive, but disjunctive, and the gift is too vague and uncertain to be carried out: *Ellis v. Selby*. (1) And supposing the purpose left in blank to be disregarded and the gift to be treated as one for "charitable or philanthropic" purposes only, it is bad because a "philanthropic" purpose is not necessarily a charitable purpose. A "philanthropic" purpose is equivalent to a "benevolent" purpose, or to a purpose or object of "benevolence and liberality," which purposes need not be "charitable," and where a gift for a charitable purpose is coupled with one for a purpose which is not charitable the whole gift is bad: *James v. Allen* (2); *Morice v. Bishop of Durham* (3); *Williams v. Kershaw*. (4)

*Whitworth*, for the trustees.

*Ingle Joyce*, for the Attorney-General. This is a good charitable gift. A gift to several religious societies would not be invalidated because one of them could not take; and where

C. A.  
1896  

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In re  
MACDUFF.  
MACDUFF  
v.  
MACDUFF.  

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(1) 1 My. & Cr. 286, 298, 299.

(2) 3 Mer. 17.

(3) 10 Ves. 522.

(4) 5 Cl. & F. 111, n.

C. A.  
1896  
In re  
MACDUFF.  
MACDUFF  
v.  
MACDUFF.

there are several named purposes it is not enough to invalidate the gift that one should be found to be bad so long as the whole will shews a charitable intention and object on the part of the testator: *In re White*. (1) The language of this will shews forcibly that what the testator contemplated was the general good.

The decisions on the word "benevolent" are not applicable.

The words "benevolent" and "philanthropic" are not synonymous. A gift to an individual might be benevolent. "Philanthropic" implies generality. According to the definitions in the Imperial Dictionary and in Webster's Dictionary, philanthropy is benevolence towards the whole of mankind. There is no decision as to whether or not a gift for philanthropic purposes is a good charitable gift; but I submit that *primâ facie* it is, and that the words "charitable or philanthropic" in the will were used by the testator in their popular sense, and that they do not necessarily shew that "philanthropic" means something different from charitable: *Dolan v. Macdermot*. (2) The word "philanthropic" was used by the testator to bring in purposes which, though not charitable in the popular sense of the word, were charitable according to the technical sense in which that word is used in this Court, and under this gift the money could be applied for purposes beneficial to the community at large: *Commissioners for Special Purposes of the Income Tax v. Pemsel* (3); *Nightingale v. Goulbourn*. (4) Then as to the blank space left for the third alternative, that does not make the whole gift void. The Court will simply treat it as if there was nothing there, and then, striking out the last "or," the gift will be "for some one or more purposes, charitable or philanthropic." *Primâ facie*, all philanthropic purposes are charitable, and "charitable" being the dominant word the general charitable intent more clearly appears: *Illingworth v. Cooke* (5); *Gill v. Bagshaw* (6); *In re Sutton*. (7)

*Hadley*, in reply. In *In re White* (1) the word "religious"

(1) [1893] 2 Ch. 41.

(4) 5 Hare, 484; 2 Ph. 594.

(2) L. R. 3 Ch. 676.

(5) 9 Hare, 37.

(3) [1891] A. C. 531, 583.

(6) L. R. 2 Eq. 746.

(7) 28 Ch. D. 464.



governed the whole gift. According to Johnson's Dictionary "philanthropy" is a love of mankind. Here there is a power of selection which might never be exercised: the word "or" and not the word "and" is used, which makes a great difference in reference to the blank, for the testator might have filled up the blank with a purpose neither charitable nor benevolent. The general benefit of mankind without any restriction as to area is too wide, vague, and indefinite to be a charitable purpose. [He referred to *In re Wall* (1); *In re Nottage* (2); *Goodman v. Mayor of Saltash* (3), and *In re Christchurch Inclosure Act*. (4)]

C. A.  
1896  
*In re*  
MACDUFF.  
MACDUFF  
v.  
MACDUFF.

*Cur. adv. vult.*

Feb. 26. STIRLING J. I desire to say that this case has been argued and will now be decided by me upon the footing that the statement in the will as to the domicil of the testator was in accordance with the fact. My reason for saying this is that there appears to be a difference between the law of Scotland and the law of England as to charitable gifts, and I propose to deal with the case as being governed by English law. [His Lordship then stated the facts, and continued :—]

I think that the gift cannot be held to be bad simply by reason of the existence of the blank. The testator seems to have wished further to consider whether the sum he mentions should be devoted to any purposes other than charitable or philanthropic; he never came to any final determination on the subject; and the will, in my opinion, ought to be read as if it had run thus—"for some one or more purposes charitable, philanthropic, or of such other nature as I may hereafter name by codicil," and as if the testator had then died without making a codicil. The effect of this would be that the sum mentioned would be applicable for charitable or philanthropic purposes only: see *Illingworth v. Cooke* (5); *Gill v. Bagshaw*. (6)

The question then arises whether a bequest for "charitable

(1) 42 Ch. D. 510.

(2) [1895] 2 Ch. 649.

(3) 7 App. Cas. 633, 642.

(4) 38 Ch. D. 520.

(5) 9 Hare, 37.

(6) L. R. 2 Eq. 746.

C. A.  
1896  
~~~~~  
In re
MACDUFF.
MACDUFF
v.
MACDUFF.
~~~~~  
Stirling J.

or philanthropic purposes" is valid according to the law of England. In order that it may be valid, the purposes as defined by the testator's will must be "charitable" in the technical sense in which that word is used in this Court. The contention for the Attorney-General was that the word "charitable" in the will was not to be understood in the technical but in the popular sense; while the word "philanthropic" was used to designate other purposes which, though not charitable in the popular sense, are nevertheless such in the technical sense. On the other hand, it was urged that among philanthropic purposes may doubtless be included many which are charitable in the technical sense, but also many which are not.

In *James v. Allen* (1) Sir W. Grant M.R. had to consider a bequest for "benevolent" purposes. He says: "The question is, what authority would this Court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute." And it was held that the gift was invalid.

In *Kendall v. Granger* (2) the bequest was to be applied for, amongst other objects, "encouraging undertakings of general utility." Lord Langdale M.R. there says (3): "Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own, that in my opinion, according to the decisions which have taken place in this Court, they are not. The words 'general utility' are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this Court is in

(1) 3 Mer. 17, 19.

(2) 5 Beav. 300.

(3) 5 Beav. 303.

the habit of considering charitable." Then he says: "I do not venture to say that I am well satisfied with all the decisions that have taken place on this subject. I think that there are older cases, shewing perhaps that the Court would, in a case where charitable purposes were mentioned, have taken care that the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on that subject. Conceiving myself bound by authority, I must declare that this is not a trust which can be carried into effect as a charitable purpose."

I respectfully agree with the concluding observations of Lord Langdale, and am not at liberty, any more than he was, to depart from the decisions. The question is whether philanthropic purposes can be effectively distinguished from benevolent purposes or purposes of general utility. "Philanthropic" is, no doubt, a word of narrower meaning than "benevolent." An act may be benevolent if it indicates goodwill to a particular individual only; whereas an act cannot be said to be philanthropic unless it indicate goodwill to mankind at large. Still it seems to me that the word "philanthropic" is wide enough to comprise purposes which are not charitable in the technical sense, and consequently that the trust declared by the testator cannot be supported.

W. W. K.

The Attorney-General appealed. The appeal came on for hearing on June 4, 1896.

C. A.

1896

*In re*

MACDUFF.

MACDUFF

*v.*

MACDUFF.

Stirling J.

*Sir R. E. Webster, A.-G.*, and *Ingle Joyce*, for the appellant. A bequest in the language adopted by the testator in this case shews a deliberate intention on his part to give the sum of 10,000*l.* in question for a charitable purpose. It constitutes a good charitable bequest of that sum, and the addition of the word "philanthropic" cannot be held to invalidate it.

No difficulty is created by reason of the blank left by the testator: *In re White*. (1) The only difficulty arises from the use of the word "philanthropic." Now, charity is the

(1) [1893] 2 Ch. 41.

C. A.  
1896  
~~~~~  
In re
MACDUFF.
MACDUFF
v.
MACDUFF.
———

dominant idea in the mind of the testator, and as philanthropic purposes embrace a vast number of objects which are charitable the gift ought not to be held to be bad merely because it might possibly embrace some philanthropic objects which are not charitable according to the technical sense of that word as used in our Courts. Assuming the gift to be disjunctive, the popular meaning of the word "philanthropic" is "beneficial to the community at large," and it thus comes within the definition of "charity" given by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel* (1): "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion, and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." A similar classification was adopted by Sir Samuel Romilly in his argument in *Morice v. Bishop of Durham*. (2) What philanthropic purpose, it may be asked, is not charitable? Lord Macnaghten goes on to point out in the case above referred to that the trusts he last mentioned are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as every charity must do so either directly or indirectly. Stirling J. has decided against us on a supposed analogy between "philanthropic" purposes and "benevolent purposes," or purposes of general utility, and upon the authority of *Kendall v. Granger*. (3) But why should philanthropy be mixed up with general utility, which takes one into a different field? The distinction between "benevolent" and "philanthropic" is clear; and it is recognised by the learned judge that philanthropy is benevolence towards the whole of mankind. The Imperial Dictionary and Webster's Dictionary both give this definition of philanthropy. According to the Century Dictionary, it is synonymous with charity. "Benevolence," on the other hand, indicates goodwill to an individual. In this case it cannot be suggested that the testator had any

(1) [1891] A. C. 531, 583.

(2) 10 Ves. 522, 531.

(3) 5 Beav. 300.

particular individual in view, for he states his inability to tie himself down to any specific scheme.

In this will, at all events, the word "philanthropic" must be treated as "synonymous" with "charitable," for the testator clearly intended to benefit such philanthropic purposes as were charitable.

[They also made use of the arguments stated in the report of the case before Stirling J., and referred to the following additional authorities: *Dolan v. Macdermot* (1); *Gill v. Bagshaw* (2); *Whicker v. Hume* (3); *Jones v. Williams* (4); *Trustees of British Museum v. White*. (5)]

Hadley, for the respondent, Miss Annie Seton Macduff, used the same arguments and cited the same authorities as appear in the report of the case in the Court below.

[LINDLEY L.J. Can you suggest a purpose which would be "philanthropic" without being "charitable" ?]

A bequest to a cricket club; a bequest of a picture to be exhibited gratis in a room hired for the purpose; a trust established for the purpose of supplying music as a source of recreation; the opening of a theatre gratis for a non-educational purpose; a gift to the nation of an observatory for the purpose of photographing the spectra of stars, which never can be useful in the sense of forwarding navigation, but merely satisfies the curiosity of cultured people. All these and many more might be mentioned as instances of liberality, and, as I contend, of philanthropy, which is not charity. The giving of pure, unalloyed pleasure to all the world is philanthropic, but not charitable. Philanthropy and benevolence both include charity; but they go further, and include more than mere charitable purposes. "Philanthropic" is a very wide word, and includes many things which are only for the pleasure of the world, and cannot be called charitable. In the case of *In re Foveaux* (6) a society for the prevention of cruelty to animals was said to be charitable because its object was a part of the moral education of mankind. Building houses for the occupation of persons not

C. A.

1896

In re

MACDUFF.

MACDUFF

v.

MACDUFF.

(1) L. R. 3 Ch. 676.

(2) L. R. 2 Eq. 746.

(3) 7 H. L. C. 124.

(4) Amb. 651.

(5) 2 S. & S. 594.

(6) [1895] 2 Ch. 501, 507.

C. A.
1896

In re
MACDUFF.
v.
MACDUFF.

actually poor at a reasonable rent would be a philanthropic object, but it could not be called charitable. In *In re Nottage* (1) a gift to promote yacht-racing, though beneficial to the public, was held not charitable.

[LOPES L.J. Would a gift for the establishment of cricket and recreation grounds be charitable?]

The trust cannot be supported unless the Court has authority to compel the trustees to apply the whole fund to purposes which are charitable in the legal sense of the word: *Morice v. Bishop of Durham* (2); *Nash v. Morley* (3); and purposes "of general utility" though philanthropic are not charitable: *Kendall v. Granger*. (4) The appellant relies on *In re White* (5), but that case in no way countenances the notion that the gift can be supported if the trustee is at liberty to apply any part of the fund to purposes not charitable. There is only one case very near this, *Browne v. Yeall* (6), where a gift for the purchase and disposition of books tending to promote the happiness of mankind was held not charitable. Lord Eldon, in *Morice v. Bishop of Durham* (7), intimates that on the context of that particular will he should have come to a different conclusion; but plainly he considered that apart from an explanatory context those words did not indicate a charitable purpose. There is no difference for the present purpose between "philanthropic" and "benevolent," but "benevolence" will not do: *Morice v. Bishop of Durham* (2); *James v. Allen* (8); *Williams v. Kershaw* (9); *In re Jarman's Estate*. (10) As to the observations of Lord Macnaghten (11), he was only giving a classification of charities under different heads, one of which was purposes of public utility not coming under any of the former heads; but he never meant to say that every object coming under that head was a charitable object. If public utility necessarily made a gift charitable, it would have been unnecessary in the Statute of Elizabeth to set forth so long a list of charitable objects.

(1) [1895] 2 Ch. 649.

(2) 10 Ves. 522.

(3) 5 Beav. 177, 182.

(4) *Ibid.* 300.

(5) [1893] 2 Ch. 41.

(6) 7 Ves. 50, n.

(7) 10 Ves. 534.

(8) 3 Mer. 17.

(9) 5 Cl. & F. 111, n.

(10) 8 Ch. D. 584.

(11) [1891] A. C. 583.

The theory of the decisions is that an object in order to be charitable must be so like one of the objects there mentioned as to come within the spirit of the statute. *Dolan v. Macdermot* (1) is rather in my favour than otherwise. The area there was restricted, and that fact is dwelt upon in the judgment. There is no case where a trust for the benefit of all persons rich and poor throughout the United Kingdom has been held charitable, though it may be so if the gift is confined to a limited area. In the case of *In re Wall* (2) Kay J. bases his judgment on the trust for "aged people," and affirms the view that "benevolent" does not express charity. Under the terms of this gift Miss Macduff might give the whole fund to purposes not "charitable" according to the legal sense of the word, and the gift is void.

Sir R. E. Webster, A.-G., in reply. Looking at the general meaning of the word "philanthropic" and at its use in this will, it cannot have the extended signification contended for by the respondents. As to *Kendall v. Granger* (3), the only point of the judgment is that "purposes of public utility" would include objects not charitable.

[LOPES L.J. You make the words "or philanthropic" useless.]

That argument did not prevail in *Dolan v. Macdermot*. (1) As to *James v. Allen* (4), it is impossible to say that "benevolent" is not wider than "philanthropic." In *Ellis v. Selby* (5) the words "or other purposes" left the application of the fund at large. As to *In re Nottage* (6), the idea of a gift to provide prizes for yacht-races being charitable is amusing. The case of cricket and recreation grounds was put by the Court. I should say they might be charitable if the trust was so guarded as to come within the Statute of Elizabeth, but not otherwise. The true principle is to take the words and context together and see whether on a fair view the whole purpose is not charitable: *Corporation of Wrexham v. Tamplin*. (7) In *Nightingale v. Goulbourn* (8) a gift to a member of the Government for the

C. A.
1896
In re
MACDUFF.
MACDUFF
v.
MACDUFF.

(1) L. R. 3 Ch. 676.

(2) 42 Ch. D. 510.

(3) 5 Beav. 300.

(4) 3 Mer. 17.

(5) 1 My. & Cr. 286.

(6) [1895] 2 Ch. 649.

(7) 28 L. T. (N.S.) 761.

(8) 2 Ph. 594.

C. A. benefit of the public was held good. The just conclusion is
 1896 that the words "charitable, philanthropic or " do not
 ~~~~~ include purposes not charitable, and the gift is good.

*In re*  
 MACDUFF.

MACDUFF

*v.*  
 MACDUFF.

LINDLEY L.J. We think we shall gain nothing by taking time to consider our judgment in this case, as we have thought over it since it was opened, and the conclusion at which we have arrived is that the judgment of Stirling J. is right.

The case is a difficult one, the difficulty arising from the language used by a will, of which I will read the important part. [His Lordship here stated the effect of the will and read the material part of the document of August 27, 1889.]

The question which we have to consider is, What is the effect of the words "purposes charitable, philanthropic, or " ? On the one hand it is said that notwithstanding the generality of this language this sum of 10,000*l.* is appropriated for general charitable purposes, and, if so, of course a scheme can be directed. On the other hand, it is said, and the learned judge has taken the view, that the clause is too general, too uncertain, and too vague to amount to a valid charitable bequest, and that the disposition of the 10,000*l.* therefore fails.

The first point to be considered is, what is the effect of the blank ? At first I was disposed to think that it made the purpose of the testator too indefinite to be treated as a charitable bequest, or as any bequest at all ; but on reconsideration, and on looking into the authorities and observing that there was a similar blank in *In re White* (1), which to my mind is nearer to this case than the other two cases in which there were blanks, I have come to the conclusion that the learned judge was right on that point, and that the true construction of this clause is, to put it shortly, that the 10,000*l.* is to be appropriated and allocated for some purpose or purposes charitable or philanthropic. The question then is, What is the meaning of these words ? The first point to be observed is that there is here nothing definite. It is not a gift to some specific institution or to some specific object with additional words. We have nothing but a direction that the 10,000*l.* is to be appropriated and

(1) [1893] 2 Ch. 41.



allocated for some purpose or purposes charitable or philanthropic, with the additional clause that the testator says he is "unable personally to tie himself down to any specific scheme as many objects supremely claimant to-day may cease to be so after a series of years, while others at present undreamt of may be found urgent." That is all we have to guide us. Now, in dealing with bequests framed in general language like this without any context to help us, what have we to get at in order to hold such a general indeterminate bequest to be valid? We must get at something sufficiently definite to guide the Court as to the kind of trust which it has to execute, and that trust must be of the kind called technically a charitable trust. To shew that that is the right principle, I will refer to the leading case of *Morice v. Bishop of Durham* (1), the judgment of Lord Eldon in which case is one of the most important upon all questions of charities. Lord Eldon there incidentally remarks (and his remarks were unquestionably true), that this Court has taken strong liberties upon the subject of charities; but, notwithstanding the strong liberties it has taken, there are certain principles which have always guided the Court. Lord Eldon says (2): "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration." That is the principle of that case, and has been enunciated or repeated from time to time, as will be found on reference to the cases of *James v. Allen* (3) and *Ellis v. Selby*. (4) Therefore, when we are dealing with general words, we must consider whether there is such an indication of purpose or of trust that the Court if called upon to execute it can see what it has to do—

C. A.

1896

*In re*

MACDUFF.

MACDUFF

v.

MACDUFF.

Lindley L.J.

(1) 9 Ves. 399; 10 Ves. 522.

(2) 10 Ves. 539.

(3) 3 Mer. 17.

(4) 1 My. &amp; Cr. 286.

C. A.

1896

*In re*

MACDUFF.

MACDUFF

v.

MACDUFF.

Lindley L.J.

can see the limits of its own powers. The words here are “purposes charitable or philanthropic.” “Charitable,” I suppose, is there used in the popular sense. I do not suppose that this gentleman, who was a clergyman, used the word “charitable” in the very wide and indefinite sense in which it is used in Courts of Equity. Probably not one man in a thousand understands what that sense is; and the sense itself is a very indefinite one, as I shall have occasion to shew presently. Then what is the meaning of the word “philanthropic”? He means by that something distinguished from charitable in the ordinary sense; but I cannot put any definite meaning on the word. All I can say is that a philanthropic purpose must be a purpose which indicates goodwill to mankind in general. Can anything be looser than that? And here arises the difficulty of which the Attorney-General has availed himself with great skill. He says, “What philanthropic purpose is not charitable?” My answer is, You are dealing with two words of so vague a meaning that it is extremely difficult to say, but we can suggest purposes which might be philanthropic and not charitable—purposes indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptance of the word—that is to say, in the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor. I do not know with anything like certainty what is meant by philanthropic, and, not knowing what is meant by philanthropic, it follows that the trustees of this will could apply this 10,000*l.* to purposes which might or might not be charitable in the technical sense of that expression. If so, this general disposition cannot be upheld as a charitable bequest. On that, again, I return to the case of *Morice v. Bishop of Durham* (1), in which Lord Eldon says (2): “The question then is entirely, whether this is according to the intention a gift to purposes of charity in general, as understood in this Court: such, that this Court

(1) 10 Ves. 522.

(2) 10 Ves. 541.

would have held the bishop bound, and would have compelled him, to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity, in general: or is it, or may it be according to the intention, to such purposes, going beyond those, partially, or altogether, which the Court understands by 'charitable purposes;' and if that is the intention, is the gift too indefinite to create an effectual trust, to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person, created the trustee, might give the property to such charitable uses, as this Court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention, have devoted every shilling to uses, in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with mal-administration, if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal: though not acts of that species of benevolence and liberality, which this Court in the construction of a will calls charitable acts." I take it that that principle is as sound now as it was when Lord Eldon announced it—he did not announce it for the first time; and certainly there was nothing said or dropped from this Court in the case of *In re White* (1) which in any way trenches upon that principle. *In re White* (1) has been referred to as if it authorized the view that this gift might be upheld as a charitable gift even if some of these philanthropic purposes might not be charitable. *In re White* (1) authorizes no such view. It was a curious and difficult case. There was a bequest "to the following religious societies," and

C. A.

1896

*In re*

MACDUFF.

MACDUFF

v.

MACDUFF.

Lindley L.J.

(1) [1893] 2 Ch. 41.

C. A

1896

*In re*

MACDUFF.

MACDUFF

v.

MACDUFF.

Lindley L.J.

then there was a blank. At first sight one would say it would be very difficult to uphold that as a valid charitable bequest ; but when the authorities came to be looked into, it was found that it had been decided, not once but several times, that a bequest for religious purposes was a charitable bequest and that this had become a settled rule. Then came the difficulty that this was not even a bequest to religious purposes, but only a bequest to religious societies, and the argument was that the purpose was indefinite. Upon consideration the Court came to the conclusion (whether rightly or wrongly does not matter now) that the bequest to religious societies implied a bequest to religious purposes ; and, having got that far, they held that this was a good valid bequest for charitable purposes. That was how that case was decided ; but it does not at all warrant the idea that it was competent for the trustees of that fund to apply any part of it to purposes which were not charitable. Then reliance is placed, and very naturally, upon the judgment of Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel* (1) ; but, when we look at that, I do not think it helps the Attorney-General at all. What Lord Macnaghten meant is tolerably plain. He took the classification of charities from the argument of Sir Samuel Romilly in *Morice v. Bishop of Durham* (2), and the passage in Sir Samuel Romilly's argument runs thus : " There are four objects, within one of which all charity, to be administered in this Court, must fall "—that is to say, within one of which they must come ; but he does not say everything which comes within any one of them must be a charity ; that may be so, or may not be so, but they must all come within one of these four heads : " First, relief of the indigent ; in various ways : money : provisions : education : medical assistance, &c. ; secondly, the advancement of learning ; thirdly, the advancement of religion ; and, fourthly, which is the most difficult, the advancement of objects of general public utility." Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not

(1) [1891] A. C. 531, 583.

(2) 10 Ves. 522, 532.



be. In *Kendall v. Granger* (1), where the language was "for encouraging undertakings of general utility," Lord Langdale came to the conclusion that that was not a charity, and I am not aware that his decision has ever been overruled or questioned. Now, what Lord Macnaghten said (2) is obviously a paraphrase of the words of Sir Samuel Romilly which I have just read: "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads," leaving out those somewhat significant words of Sir Samuel Romilly as to the fourth head, "which is the most difficult," which shewed perfectly plainly that Sir Samuel Romilly saw, and I do not doubt that Lord Macnaghten saw also, that there might be some purposes of public general utility which might be charitable and some which might not.

In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord Eldon says, this Court has taken great liberties with charities; but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth.

Now, turning to this particular case, can we fairly get out of these words any direction that this 10,000*l.* is to be applied and applied only to such purposes as the law can say are charitable? My answer is, No, the words are too general and too indefinite. I think the learned judge was perfectly right, and this appeal, therefore, must be dismissed.

LOPES L.J. I am of the same opinion. The important words in this will are these: "I, John Ross Macduff, will from my estate the entire sum of 10,000*l.*, to be appropriated and allocated for some one or more purposes, charitable, philanthropic or . . ." I read those words as if he had said "purposes charitable or philanthropic."

Great liberties have been taken with the Statute of Elizabeth,

(1) 5 Beav. 300.

(2) [1891] A. C. 583.

C. A.  
1896  
*In re*  
MACDUFF.  
MACDUFF  
*v.*  
MACDUFF.  
Lindley L.J.

C. A.  
1896  
~~~~~  
In re
MACDUFF.
MACDUFF
v.
MACDUFF.
Lopes L.J.

as has been justly said, and a signification attributed to the word "charity" very much larger than ever was intended by that statute. There have been numbers of decisions on the question whether a particular purpose is charitable or not which it is no doubt difficult to reconcile. The difficulty in this case arises from the use of the word "philanthropic"—a word dealt with, as it appears, in no previous decision. It has been argued by the learned Attorney-General that the word "philanthropic" here is synonymous with "charitable." I cannot adopt that view. It is disjunctive: we must insert the word "or" between charitable and philanthropic. I cannot help thinking that the testator intended to draw a distinction between the word "charitable" and the word "philanthropic." If the will stopped at the word "charitable" there would have been a good charitable gift; but it does not so stop—it has the addition of the word "philanthropic," and that is the word with which we have to deal.

The principle applicable to this case is not in dispute and cannot be in dispute. I adopt the words of Sir William Grant M.R. in *James v. Allen* (1), where he says: "The whole property might, consistently with the words of the will, have been applied to purposes strictly charitable. But the question is, what authority would this Court have to say that the property must not be applied to purposes however benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute." Looking at those words, I ask myself whether or not this property might not consistently with the will, having regard to the word "philanthropic," be applied to other than strictly charitable purposes, and I feel compelled to answer that question in the affirmative. It has been said that nothing can be suggested—no purpose and no object can be suggested which would come within the meaning of the word "philanthropic" which is not also a charity. If that were so, I think the argument of the Attorney-General could be maintained; but that is not a view that I am able to

adopt. I think I could suggest many objects which would come within the word "philanthropic," and to which the trustees would be entitled to apply the money, which are not charitable. I will not again allude to recreation grounds and grounds devoted to sport which are not for the poorer classes, but are generally for rich and poor alike. I think that would be a case; but there is an illustration which has occurred to me which seems not to be inapplicable to this case, and it is this—a gift, for instance, to landowners affected by agricultural depression and whose incomes are reduced to the amount of 300*l.* a year. It appears to me that that is an object which clearly would be philanthropic, but at the same time would not be charitable. I come, therefore, to the conclusion that the words used in this will are too wide and too indefinite to support the gift; and I am of opinion that the judgment of Stirling J. was right.

C. A.
1896
In re
MACDUFF.
MACDUFF
v.
MACDUFF.
Lopes L.J.

RIGBY L.J. I am of the same opinion. With reference to the blank, I have very little to say; but I am inclined to think that the proper way of looking at it is this—that where a man leaves a blank in a will and does not choose to fill it up at the time when he executes it, it must be taken that he has deliberately determined not to fill it up, and has left the Courts to deal with the construction of the instrument as it is found, and that it cannot be properly suggested that he intended to do what we all know would be a perfectly useless thing, namely, to fill up the blank at some time after execution. I treat this as a gift to charitable or philanthropic purposes.

Now, the cases with regard to charities are innumerable; but in the case of charities, as in all other cases, precedents are only useful in so far as they enable us to deduce a principle. No previous will can be treated properly as a precedent for another which is expressed in different language, and no decision on the precise words of a former will can as a general rule be of the least service in guiding the Court as to the construction of other words. Unless you can get a principle from a case which is applicable generally to other cases, the precedent is of little use. What principles do we find that are applicable to the present case? First of all, a bequest upon trust must be

C. A.
 1896
In re
 MACDUFF.
 MACDUFF
v.
 MACDUFF.
 Rigby L.J.

sufficiently certain to enable the Court to superintend and give effect to the trust according to its terms. That is a general principle that applies to all bequests, whether charitable or not; they must be sufficiently definite to enable the Court to carry the trusts into effect. Then how do charity cases differ from general cases? As it appears to me, in this respect only—that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble to the Statute of Elizabeth, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce that certain other matters are also to be treated as charitable. But before you can apply that rule you must find the idea of charity sufficiently expressed in the will, and it is not a good charitable gift if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative, the general rule comes in, that this is a matter too indefinite for the Court to give effect to it.

Now, what is the present case? It is a gift to charitable or philanthropic purposes. I am bound to say that I do not think it is very different from a gift for philanthropic purposes. There may be an argument that, “philanthropic” being joined with “charitable,” the philanthropic purposes must also be charitable; but then there is also another argument that as philanthropic purposes are distinguished from charitable purposes by “or,” that shews that philanthropic purposes are something different from charitable purposes. I think the one argument may be set off against the other, and that we get very little assistance from the fact that there is the word “charitable” used along with the word “philanthropic.” Now, suppose the word “philanthropic” stood alone. No Court has defined that word; and if we try now to define it, I confess myself unable to do so—at any rate, in any sense which would shew that the definition meant the same thing as charitable. I do not wish to attempt any very precise illustration, but I am inclined to

think that a very general illustration may be of service, and I can suppose the case of a person saying something to this effect: "The ordinary objects of charity are in my mind sufficiently provided for; but I regard the position of the well-to-do, or moderately well-to-do, classes as one also requiring consideration, and I leave my residue to trustees in order that they may in their discretion do something towards advancing the happiness and the position in life of those who are not really objects of charity, but who may be made happier, and in some sense better than they now are, with such incomes as they possess." I doubt whether any one could say that that was not a philanthropic intention—a very wide desire to improve the position of a large class of persons. Philanthropic I should think it was—charitable I feel pretty certain it would not be; and so we get to the conclusion that the word "philanthropy" may include—not cases of a totally exceptional character, but cases of a very wide class indeed, and numerous cases which would be within the popular meaning of philanthropic, and would have nothing to do with charity. That appears to me sufficient to decide the case.

I will not examine the authorities at length, but will refer to one or two of them, as shewing that the matter has come under the consideration of learned judges, and that the decisions have been in accordance with what I conceive to be the principle which I have endeavoured to express.

There is the case of *Kendall v. Granger* (1), which included purposes of general utility; and Lord Langdale, a great authority in cases of this kind, thought that there were or might be purposes of general utility which were not charitable purposes. I see no reason to doubt the soundness of that view. I do not know that that case has ever been doubted. I will take the case to which I think Mr. Hadley very properly referred us, notwithstanding the doubts which have been thrown upon the construction of that particular will—I mean *Browne v. Yeall*. (2) That appears to be a case in which the question as considered by Lord Thurlow was this, whether a gift for the purchasing and proper disposition of books for promoting the happiness

C. A.

1896

In re

MACDUFF.

MACDUFF

v.

MACDUFF.

Rigby L.J.

(1) 5 Beav. 300.

(2) 7 Ves. 50, n.

C. A.
 1896
In re
 MACDUFF.
 MACDUFF
v.
 MACDUFF.
 Rigby L.J.

of mankind was sufficiently definite; and Lord Thurlow, as explained by Lord Eldon, came to the conclusion that a gift of that kind was not sufficiently definite to be capable of being administered as a charitable gift. True it is that in that will there were words which I should have thought gave a limitation to the words "happiness of mankind," and that is what I understand to have been the view taken by Lord Eldon. He said (1) that he entertained doubt, not of the principle upon which the case was decided, but whether it was well applied in that instance, for that it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning. I am inclined to think that the view of Lord Eldon is preferable to the view of Lord Thurlow; but that is unimportant. It was on the question whether the words "happiness of mankind" were sufficiently definite that Lord Thurlow decided the case; and I do not gather that Lord Eldon or Sir William Grant would have differed if there had been nothing in the will to confine those words. The promotion of the happiness of mankind is undoubtedly a philanthropic purpose; and I think Mr. Hadley was right in saying, so far, at any rate, as the cases have been brought before us, that the expression "for promoting the happiness of mankind" is nearer in its meaning to that of the word "philanthropic" than any other expression dealt with in the cases.

There is one other case to which I will refer—*Whicker v. Hume* (2)—and in doing so I will refer also to the unreported case of *President of the United States of America v. Drummond* (3), which is mentioned in *Whicker v. Hume*. (4) I say nothing about the wide extent of the gift in *Whicker v. Hume* (2), because there is no doubt now that the extensive nature of the gift as regards the range of the objects is no objection to it; but the gift was for advancement of education and learning, and the objection was taken by counsel who were impeaching the validity of the gift that education is no doubt a charitable purpose within the Statute of Elizabeth, but learning is not—that is to say,

(1) 10 Ves. 539.

(2) 7 H. L. C. 124.

(3) Rolls, May 12, 1838.

(4) 7 H. L. C. 155.

that the promotion of abstract learning would not be a charitable purpose. That was dealt with by Lord Chelmsford and Lord Cranworth, and both of them point out that, reading the word "learning" as you find it in that will in connection with education, it must be taken as equivalent to teaching, and, therefore, as a certain branch of education; and I rather gather from their judgments, and from the pains which they take to draw out and to elucidate the meaning of the word "learning" in that will, that if they could not have put that interpretation upon it they would have doubted, at any rate, as to whether the advancement of learning as an abstract matter would be a charity at all. The Lord Chancellor, Lord Chelmsford, goes with great pains into the matter, and deals with the word "learning"; and he says (1) that the word in that will was used in the sense of teaching and instruction, "and, in that sense, it appears to me," he says, "that the case which was cited by the respondents, and which is printed in the respondent's case, of the *President of the United States of America v. Drummond* (2), may be applicable, where Lord Langdale decided, that a gift to the United States of America, to found, at Washington, under the name of the 'Smithsonian Institution, an establishment for the increase of knowledge among men,' was a valid charity." The Lords evidently doubted whether a gift for the increase of knowledge would be a good charitable gift, unless it was understood to mean a gift for teaching and education. Yet the increase of knowledge would unquestionably in these days be taken to be a purpose of general utility, and the doubt of the noble Lords appears to me to be strongly in favour of the view taken by Lord Langdale that "purposes of general utility" will not make a good charitable gift.

I have only now to deal with the supposed difficulty arising from the judgment of Lord Macnaghten, and I think it is altogether illogical to ascribe to Lord Macnaghten what is ascribed. He says cases of charity may be divided into four classes, and one of them is, "trusts for purposes beneficial to the community." You inquire what the divisions of charities are, and you come to the conclusion that there is one miscellaneous set of charities

C. A.

1896

In re

MACDUFF.

MACDUFF

v.

MACDUFF.

Rigby L.J.

(1) 7 H. L. C. 155.

(2) Rolls, May 12, 1838.

C. A.
 1896
 ~~~~~  
*In re*  
 MACDUFF.  
 MACDUFF  
*v.*  
 MACDUFF.  
 Rigby L.J.

which can be classed under that head; but to deduce from that the notion that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that "persons insured with us may be divided into men, women, and children" the deduction that every man, every woman, and every child is insured in that society.

I have only one word to say about the case of *In re White*. (1) The Court was there constrained by the authorities to say that religious purposes were all charitable; and although it was suggested that in the case of *Cocks v. Manners* (2) it had been shewn that a gift to a particular religious society in the terms in which it was given was not a charity, that to my mind makes no difficulty, because, as far as I know, and for the purposes, at any rate, of this case, I think it is true, when you class charities under the heads "gifts to the poor, trusts for the advancement of education, trusts for the advancement of religion," that does not mean that in every conceivable case where you can bring a gift under those general words such gift is necessarily a charity. It means, as in the case of "for the general benefit of the community," that these are heads under which valid charities may be arranged. No one will suggest, for instance, to take only one illustration, that the education of pickpockets in a thieves' kitchen to make them fit for their profession is a charity. It must be education of a particular kind; and when it is a gift to a religious society you may in the same way say, "Yes, but the gift is not necessarily made a charitable gift by the circumstance that it is given to a religious society, for there may be, as in *Cocks v. Manners* (2), a religious society which does not attempt to promote religion." The particular convent in that case was a set of religious people who met together, but who abstained even from good works as regards the outside public, and they did not attempt to proselytize or even to attend to the sick and to the poor, and it was held that the gift to such a society could not be called a charity. It was only a gift to particular men and women who happened at the particular moment to form part of it. I do not consider

(1) [1893] 2 Ch. 41.

(2) L. R. 12 Eq. 574.



that the case of *In re White* (1) laid down any new law, and I do not think that Lord Macnaghten's classification of charities lays down any new law whatever; and that being so, I think that the cases which shew that you must have words sufficiently defining the testator's meaning, and sufficiently shewing that it is a charitable meaning according to the standard supplied by the Statute of Elizabeth and by the analogies to that statute, still prevail. In my mind, the word "philanthropic" is too wide, and the judgment of Stirling J. must be affirmed.

C. A.  
1896  
~~~~~  
In re
MACDUFF.
MACDUFF
v.
MACDUFF.
Rigby L.J.

The costs of the respondents were ordered to be paid out of the estate as in *In re Rymer* (2), it being admitted on all hands that the Attorney-General could not be ordered to pay them.

Solicitors: *Hare & Co.*; *Thomas Webster*.

(1) [1893] 2 Ch. 41.

(2) [1895] 1 Ch. 19, 34.

H. C. J.
W. W. K.

C. A. PATERSON v. GAS LIGHT AND COKE COMPANY.

1896

[1896 P. 582.]

June 3, 9.

Supply of Gas—Arrears of Gas Rate—Receiver—Gasworks Clauses Act, 1847
 (10 & 11 Vict. c. 15), s. 16 (1)—*Gas Light and Coke Company's Act, 1872*
 (35 & 36 Vict. c. xxiii.), s. 18. (2)

A limited company (M. & Co.) was supplied with gas by a gas company. In February, 1896, P. was appointed manager and receiver of the business of M. & Co. by debenture-holders, and shortly afterwards P. and S. were appointed by the Court joint receivers and managers in an action on behalf of a higher class of debenture-holders. They entered and carried on the business, and were supplied with gas by the gas company. At the time when P. was appointed there was due to the gas company 90% for gas supplied to M. & Co. The gas company threatened to cut off the supply unless the 90% arrears was paid, and the receiver brought an action to restrain them. Kekewich J. granted an injunction to restrain them from doing so, holding that the receivers were new tenants entitled in their own right to a supply of gas without liability for the arrears due from M. & Co. :—

Held, on appeal, that the relation of the plaintiffs to M. & Co. was not that of incoming and outgoing tenant, but of caretaker and owner, and that the plaintiffs were in no better position against the gas company than M. & Co. were, and could not claim a supply of gas except on payment of the arrears.

IN 1890 Marriage, Neave & Co., Limited, proposed to issue 85,000% of first mortgage debentures. By deed dated June 30,

(1) The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16: "If any person supplied with gas by virtue of this or the special Act neglect to pay the rent due for the same to the undertakers, the undertakers may stop the gas from entering the premises of such person, by cutting off the service-pipe, or by such means as the undertakers shall think fit."

(2) Gas Light and Coke Company's Act, 1872 (35 & 36 Vict. c. xxiii.), s. 18: "In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not re-

quire from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act on being required by him to do so."

1890, the business premises were demised by the company to two trustees for the residue of the term for which the company held them, less three days, upon the trusts declared by the next-mentioned indenture. By an indenture of the same date, made between the company and the trustees, the company conveyed to the trustees all its property, except its interest in the hereditaments conveyed to the trustees, and also by way of conveyance and not of exception all rights of the company, including uncalled capital, excepting only such chattels as could not be charged by an unregistered bill of sale. It was declared that the hereditaments, property, and rights vested in the trustees should be held by them upon trust to permit the company to hold and enjoy the premises and carry on thereon and therewith its business, and to deal with and dispose of the property in the ordinary course of its business, until the security created by the present indenture became enforceable, and then, upon the request of half the debenture-holders, to take possession, and, with or without taking possession, sell the property. It was provided that the security should become enforceable if default was made for six weeks in payment of interest on any of the debentures, or if a winding-up order was made, and in certain other events. The trustees, if the security became enforceable, were authorized, instead of entering, to appoint a receiver or receivers, every such receiver to be deemed the agent of the company. The receivers were empowered, with the consent of the trustees or the majority of them, to exercise all the powers thereby given to the trustees upon entering into possession. Among these powers were ample powers for carrying on the business. Trusts in favour of the debenture-holders were declared of the proceeds of sale, and of the profits arising from the business, if carried on by the trustees or by a receiver.

In another deed of the same date, made between the same parties, similar trusts and provisions were contained in favour of the holders of a set of second mortgage debentures, which the company proposed to issue to the amount of 60,000*l*. All these trusts and provisions were subject to those of the above deed for securing the first debentures.

On February 6, 1896, the plaintiff Paterson was appointed

C. A.

1896

PATERSON

v.

GAS LIGHT
AND COKE
COMPANY.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.
—

receiver under the powers of the deed in favour of the second debenture-holders, and on the following day he entered into possession and carried on the business. On February 17, 1896, an order was made by the Court in an action by the North of England Trustee and Assets Corporation, on behalf of themselves and all other the holders of first debentures, against the company, appointing Paterson and Stephens joint receivers and managers. They entered and from that time carried on the business.

At the time of Paterson's appointment as receiver and manager there was due to the gas company 90*l.* 14*s.* 5*d.* for gas supplied to Marriage, Neave & Co. up to Christmas, 1895. The gas company, who had continued to supply gas to the premises, threatened to cut off the supply of gas unless these arrears were paid. The receivers thereupon commenced this action against the gas company to restrain them from doing so. Kekewich J. held that the receivers were new occupiers entitled to demand a supply of gas without regard to previous arrears, and, the parties consenting that the motion for injunction should be treated as a motion for judgment, he made an order declaring that the plaintiffs were not liable to pay any arrears accrued due prior to February 7, 1896, as a condition precedent to a supply of gas to the plaintiffs in respect of the premises, and that the plaintiffs, undertaking to sign the necessary contract and give if required such security as the Acts of Parliament direct for a supply of gas to the premises, were entitled to such supply, and declaring that the plaintiffs were liable to pay for the gas supplied to the premises since February 7, 1896.

The gas company appealed.

Warrington, Q.C., and *Danckwerts*, for the appeal. We rely on the Gasworks Clauses Act, 1847, s. 16, which gives power to the gas company to cut off the supply if the rate is not paid, and this right had vested in the company before the appointment of a receiver. The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 14, 15, makes it compulsory on a gas company to supply gas within certain limits; and by s. 39 an incoming tenant is not liable to pay arrears of the preceding

tenant unless he has agreed to pay them. By the Gas Light and Coke Company's Act, 1870 (33 & 34 Vict. c. cxxi.), s. 15, a supply is to be furnished to a new tenant without payment of arrears due from the late tenant, unless the incoming tenant has agreed to pay them. By the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 11, the gas company is bound, on being required so to do by the "owner or occupier" of any premises within a certain distance from any main of the company, to give and continue to give a supply of gas to such premises; and by s. 39, if any consumer of gas leaves the premises without paying the gas rent, the company cannot require payment of the arrears from the next tenant unless such incoming tenant has undertaken with the former tenant to pay or exonerate him from payment of such arrears. The Gas Light and Coke Company's Act, 1872, s. 18, introduces a further exception, that the new tenant is to pay the arrears if he continues the business of the outgoing tenant and has paid a valuable consideration for it. These are the enactments bearing on the subject. We rely on s. 16 of the Act of 1847, and the only qualification of this on which the tenant can rely is that contained in the Gas Light and Coke Company's Act, 1872, s. 18. We say that the limited company were tenants all along; the receivers are not incoming tenants. *In re Smith* (1) decided this in the case of an official receiver acting under a receiving order in bankruptcy, who is in the same position as a receiver appointed by the Court in an action: see Bankruptcy Act, 1883, s. 70, sub-s. 2; and in *Paterson v. Corporation of Nottingham* (2) the same view was held. The receivers are mere custodians.

[LINDLEY L.J. If so, could they claim a supply?]

Probably not, and such a view would lead to no hardship. If there are assets enough to pay the arrears, no question arises; if there are not, it would be hard that the gas company should be obliged to supply persons representing an insolvent company.

Renshaw, Q.C., and *A. R. Kirby*, for the plaintiffs. The gas company are claiming the position of secured creditors.

(1) [1893] 1 Q. B. 323.

(2) *Journal of Gas Lighting*, July, 1891.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.

There is no question as to the future supply; the only question is as to the arrears. The company rely on s. 16 of the Act of 1847. But that section does not deal with change of tenancy or ownership: it only contemplates the case of a gas consumer continuing in possession and failing to pay his gas rates. By s. 39 of the Metropolis Gas Act, 1860, an incoming tenant is not to be liable to pay arrears unless he has agreed with the former tenant to pay them. Sect. 15 of the Gas Light and Coke Company's Act, 1870, is in almost the same words; and s. 39 of the Gasworks Clauses Act, 1871, is to the same effect. Then we have s. 18 of the Gas Light and Coke Company's Act, 1872. By this clause the incoming tenant is not liable to arrears except in certain specified cases, and we do not come under any of them. The owners here in the legal sense are the trustees of the debenture-holders' deed, and the company were entitled to remain in possession till the debentures became enforceable. Then there was a change of occupation. The possession of the receivers and managers was not possession by them as agents of Marriage, Neave & Co.; they were officers of the Court standing in a fiduciary position: *Owen & Co. v. Cronk* (1); *Burt, Boulton & Hayward v. Bull* (2); *Gaskell v. Gosling*. (3) The position of a receiver was considered by Chitty J. in *Corporation of Bacup v. Smith*. (4) Now, can we come under the exceptions in the Act of 1872, s. 18? Suppose a freeholder let to a tenant who becomes a gas consumer, and the landlord then determines the lease under a proviso. In what position is he? Not a tenant; but surely he would be such for the purposes of this Act. Marriage, Neave & Co. were in possession; when the debentures became enforceable the receivers ousted them and became incoming tenants.

Warrington, Q.C., in reply. The plaintiffs make a point that we are attempting to make ourselves secured creditors. On the other side, it must be borne in mind that the gas company are not like ordinary tradesmen. They are bound to supply gas, and if this be considered, there is no hardship

(1) [1895] 1 Q. B. 265.

(2) *Ibid.* 276.

(3) [1896] 1 Q. B. 669.

(4) 44 Ch. D. 395.

in their having a preference. The case resolves itself into the interpretation of s. 16 of the Act of 1847 and s. 18 of the Act of 1872. If the plaintiffs are occupiers who could claim a supply, they are met by the fact that Marriage, Neave & Co. have been owners all along, and were in arrears before the receivers were appointed. There may be changes in actual occupation which do not give a right to a fresh supply. Receivers represent the persons interested in the property: *Chinnery v. Evans*. (1)

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.
—

Cur. adv. vult.

June 9. LINDLEY L.J., after stating the facts, proceeded as follows:—It is important to observe that the 90*l.* 14*s.* 5*d.* became due from the mill company whilst the debenture-holders' security was a floating security. It is also important to bear in mind that the gas never was in fact cut off. No new or fresh supply was wanted, no pipes had to be laid down, no meter had to be provided. What the plaintiffs wanted was simply that the defendants should allow gas to come as usual, and not prevent it from so doing. The defendants were quite willing to do this if the plaintiffs would pay, or undertake to pay, the 90*l.* 14*s.* 5*d.* The plaintiffs would not do this. But there was no other dispute between the parties. The only sections, therefore, which really govern the question which has to be decided are s. 16 of the public Act of 1847 and s. 18 of the company's private Act of 1872. [His Lordship read these sections.] It is plain from the foregoing observations and the language of these two sections—(1.) that the gas company is entitled to refuse to supply gas to the mill company unless and until the 90*l.* 14*s.* 5*d.* due from it is paid; (2.) that until that sum is paid the gas company is entitled to refuse to supply gas to the mill at the request of any one unless he is in some better position than the mill company—in other words, unless he is entitled, under s. 18 of the special Act, to have gas supplied to the mill without complying with the condition which the gas company is entitled to impose on the

(1) 11 H. L. C. 115.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.
Lindley L.J.

mill company. Are, then, the receivers appointed by the Court at the instance of the debenture-holders in a better position in this respect than the mill company? I am of opinion that they are not. The right of the gas company to refuse to supply gas to the mill company unless they paid the 90*l.* 14*s.* 5*d.* had accrued before any receiver was appointed, although the notice that such right would be enforced was not given until afterwards. The receiver appointed by the trustees on February 6 was clearly in no better position in this respect than the mill company. The receivers appointed by the Court on February 17 are not technically appointed under the terms of the debenture trust deed, and are not in all respects in the same position as receivers appointed by the trustees themselves. At the same time, the receivers appointed by the Court are appointed for the benefit of the debenture-holders, and, having regard to the nature of their security and to the obligation imposed by statute on the gas company to continue to supply gas to the mill, it would, in my opinion, be very unjust if the debenture-holders could enforce this obligation against the gas company without complying with the condition of paying for the gas supplied to the mill company whilst the debenture-holders permitted the mill company to carry on its business. The plaintiffs, being receivers and managers appointed by the Court, were lawfully in possession of the mill, and were entitled (with the leave of the Court) to use the name of the mill company for any purpose which might be necessary to enable them to discharge their duties. The plaintiffs clearly could, by using the name of the mill company, require gas to be supplied to the mill after their appointment, upon payment of the sum due to the gas company for gas supplied to the mill previously to their appointment. It was strenuously contended that the plaintiffs could, simply as occupiers of the mill, have required gas to be supplied to it without requiring such supply in the name of the mill company, and this view was adopted by Kekewich J. But the term "occupier" is ambiguous. In one sense a caretaker is an occupier, but in another sense his occupation is that of some other person. But, further, the sections relied upon as entitling the plaintiffs to require a supply simply as occupiers

contain nothing which negatives the right of the gas company to withhold such supply until payment of the sum due for gas previously supplied to the mill company. The two sets of sections must be read together. The general right of an owner or occupier to require a supply is limited by the right of the gas company to refuse a supply in certain specified cases. We are thus brought back to s. 18 of the private Act of 1872. This section, although badly worded, has, in my opinion, no application to such a case as that before us. It does not apply to persons simply put in possession of the premises of a defaulting consumer to manage his business for the benefit of his creditors and of himself. The statute contemplates and provides for a change of possession of a very different nature; and its language is quite inappropriate to cover such a case as this. The plaintiffs' rights as receivers and managers were merely those of custodians of the mill company's property. The relation of the mill company to the plaintiffs was not the relation of outgoing and incoming tenant, nor of vendor and purchaser, but that of owner and caretaker; and the relation of the plaintiffs to the gas company was the same. The position of the plaintiffs towards the gas company is precisely similar to that of the official receiver in *Smith's Case*. (1) It is true that *Smith's Case* (1) turned on the public Gas Acts only, but s. 18 of the private Act, 1872, is not more favourable to the plaintiffs than s. 39 of the public Act of 1871, which was the governing enactment in *Smith's Case*. (1) In *Smith's Case* (1) the official receiver took possession of the debtor's business premises; but the learned judge held that he was not entitled to a future supply without paying the amount due from the debtor for gas supplied before the receiver was appointed. This decision appears to me to have been correct, for the official receiver was only an "occupier" in the sense of a caretaker. This view of the case renders it unnecessary to consider some subordinate points which would only arise if the plaintiffs were right in their main contention. The appeal must be allowed, and judgment must be entered for the defendants with costs here and below.

(1) [1893] 1 Q. B. 323.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.
Lindley L.J.

C. A.

1896

PATERSON

v.

GAS LIGHT
AND COKE
COMPANY.

LOPES L.J. I will not restate the facts which have been so fully stated by my learned brother Lindley L.J. ; indeed, I feel I can add nothing to the judgment he has just delivered.

The decision of this question appears to me to depend upon s. 16 of the public Act of 1847 (10 & 11 Vict. c. 15) and s. 18 of the company's private Act of 1872 (35 & 36 Vict. c. xxiii.). Having regard to the section of the first-named Act, there can be no doubt that the defendant company are entitled to refuse to supply gas to any consumer until any arrears are paid under s. 16 of the Act of 1847 ; the defendant company, therefore, were justified in refusing to supply gas to the mill company after Christmas, 1895, until the arrears up to Christmas were paid. Unless, therefore, the plaintiffs can bring their case within the provisions of s. 18 of the special Act, their case fails. It is said that the plaintiffs were new occupiers, and therefore bring themselves within s. 18 of the private Act. I think not. In my judgment there has been no change of possession. The plaintiffs are mere custodians, placed there by the order of the Court ; they are mere caretakers, and *Smith's Case* (1) is in point, and in principle is undistinguishable from this case.

I am of opinion, therefore, that the appeal should be allowed.

RIGBY L.J. I am of the same opinion. In my judgment the whole question has to be determined upon two sections that have been referred to—s. 16 of the public Act of 1847, and s. 18 of the company's private Act of 1872 ; and that being the case, I do not feel myself bound to express any opinion as to what would be the position of a receiver appointed by the company if he were not within these two sections, or rather, I ought to say, within s. 16, and not in any way saved from the operation of s. 16 by s. 18 of the Act of 1872.

I should have considerable difficulty in holding that a receiver appointed by the Court had not, independently of those sections, a right as occupier to demand a supply of gas ; and, so far as my opinion goes, if the case should ever arise independently of these sections of the Act of 1847 and the Act of 1872, I wish it to be understood that I express no opinion whatever upon it.

(1) [1893] 1 Q. B. 323.

Now, coming to those sections, it is plain that there has been no change of ownership in this case as distinguished from a change of possession or occupation. Therefore I come to the conclusion that the case is within the letter and within the meaning of s. 16 of the public Act which is incorporated with the company's private Acts.

Marriage, Neave & Co. were supplied with gas. They neglected to pay the rent due, and s. 16 of the Act of 1847 provides that under such circumstances the undertakers may stop the gas from entering the premises of such person, and there is no provision that that person shall remain in possession. These are the premises of Marriage, Neave & Co., and so in terms the Act applies. Looking to s. 18 of the Act of 1872, I think there may be derived what will aid us in coming to the conclusion at which we arrive. It is a very curious section. On the face of it it does not appear to be intended to exhaust the cases where the consumer leaves the premises in which the gas was supplied to him without paying to the company the rate or meter rent due from him. I will assume now, for the purposes of this case, that the limited company had, within the meaning of that section, left the premises, which is not absolutely clear. The clause then says: "the company shall not require from the next tenant of the premises payment of the arrears so left unpaid," except in certain specified cases. I gather from that that the gas company are to have a right to require payment from the incoming tenant in the excepted cases that are provided for by the words of that section, and as correlative to that right they are to have the duty of supplying the incoming tenant as required by this Act on being required by him to do so. That is not the position of things here, because it would appear that the receivers do not fall within any of the excepted cases. The first is, "unless the incoming tenant agreed with the defaulting consumer to pay the arrears." An agreement of that sort would be one that would not give, independently of statute, a right to the gas company to require from the incoming tenant the payment, although he had agreed with the outgoing tenant to pay it. But I read the section as giving the gas company that right. If there has been an

C. A.

1896;

PATERSON

v.

GAS LIGHT
AND COKE
COMPANY.

Rigby L.J.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.
Rigby L.J.

agreement with the incoming tenant to pay the outgoing tenant's arrears, the statute (as I read it) gives the gas company a right directly against the incoming tenant, without having recourse to the outgoing tenant at all. There was a like provision in s. 15 of the Act of 1870; but the next exception is a new one—"or unless the incoming tenant shall continue the trade or business of the outgoing tenant." Now if it had stopped there, it is plain that the receivers appointed by the Court are continuing the business of the outgoing tenant, and I think that the intention of the Legislature, so far as it provided for the case at all, was this—that the supply of gas for the trade or business was to be treated under the circumstances provided for as being a supply furnished, not for the personal benefit only of the outgoing tenant, but for the purposes of the business which was taken up and carried on by the incoming tenant. But, again, there are cases in which it would be altogether unjust to charge an incoming tenant for taking up the trade or business, and therefore there is added the additional requirement that that incoming tenant shall have paid for it, not necessarily to the outgoing tenant, but either to the outgoing tenant or the owner, lessee, or mortgagee in possession—that, in fact, he shall have acquired the benefit of the trade or business for valuable consideration; and in that case I conceive that s. 18 makes him, on very reasonable grounds, liable to the company to pay for the arrears of gas supplied to the business, as well as for the continuing supply, at the same time entitling him under ordinary terms to such a continuing supply. It is clear that these receivers and managers, whether they are occupiers or not, are not persons who have paid anybody a valuable consideration for continuing to carry on that trade or business, though they are in fact carrying it on.

Now, the case being in that position, how are we to deal with it? We cannot say that it is by implication included under the principle of the 18th section, because that clause is too carefully guarded to allow of such an implication. My conclusion is, that there was an intermediate state of things in which they were left—that is, that the gas company were left to the remedy given by s. 16 of the Act of 1847, to stop the supply, without

acquiring a right to sue the incoming tenant. I do not see anything to take away their remedy under s. 16 of the Act of 1847, and I think that no right which the receiver appointed by the Court might have (as to which I propose to say nothing at all) under clause 11 of the Act of 1871, or any other clause that exists as to occupiers, is intended to interfere with that right.

I think, therefore, the gas company were right in their contention, limited as it is to saying, "We will cut off the supply unless you pay these arrears." They have never refused to continue the supply on the terms that would be open to any occupier. They have not challenged, in fact, the position of the receivers appointed by the Court as occupiers. They only say that they are entitled to their remedy under s. 16 of the Act of 1847, and that there is nothing in the later Acts to take it away. In that contention, in my opinion, they are right.

Solicitors for appellants: *Bedford, Monier-Williams & Robinson.*

Solicitors for respondents: *Grundy, Kershaw & Co.*

H. C. J.

C. A.
1896
PATERSON
v.
GAS LIGHT
AND COKE
COMPANY.
Rigby L.J.

In re LE BRASSEUR AND OAKLEY.

*Solicitor and Client—Costs—Taxation—Common Order—Moneys received by
Solicitor for Client—Counsel's Fees.*

C. A.
1896
June 17, 26.

The provision in the common order to tax a solicitors' bill, that the solicitor "do give credit for all sums of money by him received of or on account of" the client, includes and is confined to all moneys which the solicitor, in his character of solicitor or agent of the client, has received, or is legally or equitably liable to pay over to the client, and against which (if sued for by the client) the solicitor could set off his costs when taxed.

Consequently the solicitor is not bound to give credit for moneys received by him and applicable to the payment of fees due by him to the client as counsel in matters not connected with the bill of costs.

Observations on the honorary character of counsel's fees.

MOTION to discharge an order made by the Taxing Master on April 21, 1896.

C. A.
1896
In re
LE BRASSEUR
AND
OAKLEY.

Messrs. Le Brasseur & Oakley had acted as solicitors for Mr. F. A. Hull Terrell, who was a member of the Bar, in some conveyancing matters. On January 14, 1896, he obtained the common order for delivery and taxation of their bill of costs. This order contained the following clause: "It is ordered that the said solicitors do give credit for all sums of money by them received of or on account of the petitioner."

Mr. Terrell had been employed by the solicitors as counsel in the proceedings before a Parliamentary Committee in relation to bills promoted by two railway companies. He alleged that his fees in relation to those matters had not been paid, and, in the course of the proceedings under the order to tax, he made an affidavit in which he said he was informed and believed that the solicitors had received from their clients moneys more than sufficient to cover the amount of his fees, and that they ought to have applied those moneys in paying his fees. In the proceedings before the taxing master, Mr. Terrell contended that the solicitors ought to give credit for the moneys which he alleged that they had thus received. The solicitors denied that they had received any such moneys, and said that there were not any fees owing by them to Mr. Terrell. The taxing master expressed an opinion that the solicitors should file an affidavit relating to Mr. Terrell's claim, and should produce to him or his solicitor all correspondence and accounts relating to the said bills or the promotion thereof.

On April 24 the solicitors gave the following notice of motion before Kekewich J.: "That the order dated April 21, 1896, by the taxing master, whereby he directed that the said solicitors should file an affidavit relating to the claim of Frank Arnold Hull Terrell (the petitioner named in the order of January 14, 1896), to have credit in the said taxation for fees alleged to be due to him in respect of the Great Northern and City Railway Bill and the London, Walthamstow and Epping Forest Railway Bill, and should produce to the said Frank A. H. Terrell or his solicitor all correspondence and accounts relating to the expenses of the said bills, or the promotion thereof, may be discharged, and that the taxing master be directed to proceed with the said taxation without regard to such claim."

Warrington, Q.C., and *G. Cave*, for the solicitors.

P. O. Lawrence, Q.C., and *Cababé*, for the client.

C. A.

1896

In re

LE BRASSEUR
AND
OAKLEY.

KEKEWICH J. was of opinion that the motion was irregular, but he thought it better to express his opinion on the point of substance at issue between the parties. He accordingly declined to make any order on the motion; but the order as drawn up expressed the opinion of the Court "that in the said taxation the taxing master ought not to include any item alleged to have been received by the said solicitors on behalf of the said F. A. Hull Terrell as counsel's fees."

Mr. Terrell appealed.

Cababé, for the appellant. The solicitors ought to give credit in their cash account for the sums which they have received for the purpose of paying counsel's fees.

[LOPES L.J. Could the client have sued the solicitor for money had and received to his use?]

[*Warrington, Q.C.*, for the solicitors. I contend that he could not.]

The question has been raised in an irregular way. The proper course would have been to carry in objections to the taxing master's certificate when made.

Warrington, Q.C., and *G. Cave*, for the solicitors. The learned judge has expressed his opinion on the matter of substance, and this Court will decide that point. The clause in question in the common order must be limited by reference to the subject-matter—that is, to moneys which the solicitor has received as solicitor or agent for the client. The account cannot be extended to moneys which the solicitor has received outside that relation. The earliest authority on the subject restricted the account to matters connected with the bill which was ordered to be taxed, but this limit has been extended since: *Jones v. James* (1); *In re Smith* (2); *Russel v. Buchanan* (3); *Cooper v. Ewart*. (4)

Cababé, in reply. The clause ought to be construed as

(1) 1 Beav. 307.

(2) 4 Beav. 309.

(3) 9 Sim. 167.

(4) 2 Ph. 362.

C. A.
1896
In re
LE BRASSEUR
AND
OAKLEY.

including all moneys which the solicitor has received in his professional capacity on behalf of the particular client, though not necessarily as solicitor for the client in the particular matter. The Court has jurisdiction over the solicitor in his character of solicitor. This is in accordance with what Lord Cottenham said in *Cooper v. Ewart*. (1) The moneys which the solicitors received for fees from the client could have been applied by them to the payment of their bill of costs. They had a lien upon the moneys. This is the real test. Counsel can prove for his fees in the bankruptcy of a solicitor: *In re Hall*. (2)

Cur. adv. vult.

June 26. LINDLEY L.J. This appeal against an order made by Kekewich J. in the course of a taxation of costs gives rise to three questions of some importance. [His Lordship stated the facts, and continued:—]

The first question is as to the procedure. The second is as to the meaning of the clause in the common order to tax which directs the solicitor to give credit for all sums of money by him received of or on account of the client, under which the master has to take an account of the solicitor's receipts. The third point is with reference to the question of barrister's fees. They are entirely distinct points, and must be dealt with separately.

Now, first, as to the procedure. The learned judge himself said that the procedure had been all wrong, and that with regard to the supposed order of the taxing master, which in the notice of motion is treated as an order of April 21, 1896, by which the master directed the solicitors to file an affidavit and to produce documents, there never was any such order, and the whole thing is a myth. As I understand the facts, there was only an expression by the taxing master of his intention to require these things to be done. The application, therefore, to the judge for an expression of his opinion was utterly irregular. Kekewich J. felt that and said so. But he said that, inasmuch as the case had been discussed before him and the matter was

(1) 2 Ph. 362.

(2) 2 Jur. (N.S.) 1076.

one of some importance, he would, notwithstanding the irregularity of the procedure, express his opinion on the point, and he did so. I cannot help thinking it would have been very much better if the learned judge had declined to hear the motion at all. It is entirely contrary to the present practice. I do not say such a thing was never done in old times—perhaps it was. But ever since the present rules have been in existence—I refer to Order LXV., r. 27, sub-rr. 39–42—the mode of procedure on questions of this kind is this: the taxing master has to make his certificate; the party who is dissatisfied has to carry in objections to the certificate; the taxing master has to answer the objections, and then the dissatisfied party appeals. In this way the Court before whom the case comes knows exactly what the facts are; whereas, by this short cut, although it has some advantages which Kekewich J. thought justified him in making his order, the Court is in truth acting on a hypothetical state of things without knowing the real facts at all. That this course is irregular is obvious from reading the rules. I do not propose to go into them—they are perfectly clear; and I can only venture to express my regret that the learned judge did not decline to hear the motion, and dismiss it altogether. However, inasmuch as the learned judge did go into the merits of the case, and we also have heard the merits fully discussed, I am not prepared to say that it is our bounden duty to be such martinets as to dismiss the appeal without saying anything about the controversy which is really at the bottom of it. I shall therefore state my opinion on the merits of the case. At the same time, I protest against any procedure of this kind, and venture to express a hope that it will not be made a precedent. If it is, the Court of Appeal will not be so indulgent as it is now.

The next question is as to the meaning of the clause which orders the solicitor “to give credit for all sums of money by him received of or on account of the petitioner.” A discussion has been raised as to the meaning of that clause, and we have been asked to endeavour to expand it and to give some direction which may be useful for the guidance of taxing masters and solicitors interested in taxing bills.

C. A.
1896

In re
LE BRASSEUR
AND
OAKLEY.

Lindley L.J.

C. A.
 1896
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*In re*  
 LE BRASSEUR  
 AND  
 OAKLEY.  
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 Lindley L.J.

Since the argument took place we have taken the trouble to make some inquiries, and we have seen one or two of the taxing masters, and the result is that the taxing masters seem to differ somewhat in opinion as to the exact scope of that clause of the common order to tax. In *Morgan and Wurtzburg on Costs* (a book well known to us all as being very accurate) there is this passage, at p. 441: "Under the common order for taxation the master is bound to take a general account of receipts and payments by the solicitor as agent to the client." That is in exact accordance with the words of the order. Nothing can be wider. The learned authors refer to *Russel v. Buchanan* (1) and *Cooper v. Ewart* (2), and they add, "but see *Jones v. James* (3) and *In re Smith* (4), from which it would seem that the master is not, under such an order, authorized to take an account of pecuniary matters between the solicitor and client generally, but must confine himself to payments by the client, on account of the bill of costs, unless by agreement between the solicitor and client the moneys coming into the hands of the solicitor are to be applicable to payment of the bill of costs: see observations on these cases in *Cooper v. Ewart*." (2) One of the taxing masters told us that, notwithstanding the general words directing the solicitor "to give credit for all sums of money by him received of or on account of the petitioner," he had been in the habit of construing the clause as confined to moneys received by the solicitor in respect of the bill of costs under taxation; and that limitation is, no doubt, to some extent warranted by the observations of Lord Langdale M.R. in *Jones v. James* (3) and in *In re Smith*. (4) Other taxing masters think that that would be drawing the line too strictly, and, having regard to the authorities, it seems to us that it would be too narrow a construction to exclude every item which does not bear upon the bill of costs which is to be taxed. We think that the true principle is that which was laid down first in *Russel v. Buchanan* (1), and again by Lord Cottenham in *Cooper v. Ewart*. (2) That throws the net a little wider. We think that the clause in question must be read as including and as

(1) 9 Sim. 167.

(2) 2 Ph. 362.

(3) 1 Beav. 307.

(4) 4 Beav. 309; 9 Beav. 182.

confined to all moneys which the solicitor, in his character of solicitor or agent of the client, has received for or is legally or equitably liable to pay over to the client, and against which, if sued for by the client, the solicitor could set off his costs when taxed. This makes set-off the real criterion. In practice this will work out thus. Suppose the client brought an action against the solicitor for moneys received by him for the client, could the solicitor defend himself in the action by setting off his bill of costs when taxed? If yes, the taxing master must take those moneys into account. If no, the taxing master ought to exclude them. There may be circumstances in which a solicitor who has received money from his client could not set off against it his bill of costs—if, for instance, he received it for a special purpose, or under other circumstances or arrangements which would preclude the set-off. If so, the master has nothing to do with the money so received. But if, on the other hand, in an action brought by the client to recover the money, the solicitor could set off his bill of costs, it appears to us that Lord Cottenham L.C. and Shadwell V.-C. were quite right in saying, as they did say in effect, that the money so received must be brought into the account.

Having expressed our approval of that construction of the clause, which enlarges its scope as understood by some of the taxing masters, and at the same time does not throw the net so wide as to include everything which the solicitor has received, I pass on to consider the third question—that of counsel's fees. This brings us to the real substance of the case. Are the solicitors right in their contention, or is Mr. Terrell right? The solicitors say that the taxing master ought not to deal with these fees; Mr. Terrell asks us to say that he ought. It appears to me (I am speaking now for myself only) that upon that matter the solicitors are absolutely in the right. It would, I think, be much to be regretted if this Court, either by itself or by its officers, did anything to enable counsel to recover his fees from his client, whether the lay client or the solicitor client. Fees are payable as a matter of honour. The solicitor can, if so required by counsel, be compelled either not to retain him or to pay his fee with the brief. That is the remedy of counsel,

C. A.

1896

*In re*

LE BRASSEUR

AND

OAKLEY.

Lindley L.J.

C. A.  
 1896  
*In re*  
 LE BRASSEUR  
 AND  
 OAKLEY.  
 Lindley L.J.

and he has it in his own hands. If he does not choose to insist on payment of his fees with the brief, the payment becomes a matter of honour, not of legal obligation. Having regard to the affidavits, I do not think there is the slightest ground for suggesting that these solicitors have received money from their clients on such terms or under such circumstances that any action could be brought against them by the counsel. I doubt whether anything short of a bond would enable counsel to sue a solicitor for his fees; but we need not go into that question. In *In re Hall* (1), where counsel was admitted to prove for fees in the bankruptcy of some solicitors, the decision proceeded entirely on an admission made by the solicitors that they had actually received a specific sum in respect of the fees in question from their clients previously to the bankruptcy—an admission which it would be very difficult to get over. I say no more about that case. But I think it is of the utmost importance that the Court should not assist barristers to recover their fees. If they do so, the whole relation between a barrister and his professional client will be altered, and a door will be opened which will lead to very important consequences as regards counsel. The inevitable result will be to do away with that which is the great protection of counsel against an action for negligence by his client. The taxing master, therefore, had nothing to do with the question of counsel's fees, and he ought not to have gone into it at all. In that respect the solicitors are absolutely in the right, and Mr. Terrell is absolutely in the wrong. Kekewich J. was right in saying that the taxing master ought not to have gone into the matter, and we affirm his view of the case. But, inasmuch as the whole proceeding has been so utterly irregular, it appears to us that, having expressed our opinion as to what is right, we ought to discharge the order of Kekewich J., on the ground, that although we agree with his view, the order ought never to have been made, and to give no costs either below or here.

LOPES L.J. Mr. Terrell, under the common order to tax, seeks to set off his fees against his solicitor's bill of costs



incurred in a private matter of his own unconnected with the fees said to be due to him in respect of a brief or briefs delivered to him in a matter before a Committee of the House of Commons. The procedure which has been adopted in this case is most irregular. The question was brought before Kekewich J. by means of a notice of motion, which is certainly not the usual way. The matter ought to have been dealt with in the usual way, namely, by objections to the certificate of the taxing master; and, if that course had been adopted, the question would have come before us in a different and more definite form, and would have been much easier to deal with. In my opinion, Kekewich J. ought to have declined to hear the motion. However, he did hear it at some length, and we also have heard it at some length; and in these circumstances it appears to me the preferable course is for us to express an opinion on the merits.

Now, the main question is this: What is the effect of that clause in the common order to tax which directs credit to be given by the solicitor for all sums of money by him received of or on account of the client? It has been already stated by my brother Lindley that we have taken a good deal of trouble to inquire what the usual practice is, and that different views are entertained by different taxing masters. Some take a very narrow view, and think that there ought to be included under these words only matters which have relation to the bill of costs then under taxation. Other taxing masters take a much wider view. In the result, we have adopted an intermediate view; and after careful consideration the conclusion at which we have arrived is that which has been already stated by my brother Lindley. I think that is the proper rule to adopt, and it seems to me that it will be easy to work.

The only other question is with regard to counsel's fees. I entirely agree that the Court cannot and ought not to assist a barrister in recovering his fees. Their payment is only a matter of honour. It is open to counsel, if he thinks fit, not to accept a brief unless the fee is prepaid, and it would be contrary to all the decisions, and I think against good policy, to hold that counsel's fees are recoverable. The decision of the Court of

C. A.

1896

*In re*

LE BRASSEUR

AND

OAKLEY.

Lopes L.J.

C. A. Common Pleas in *Kennedy v. Broun* (1) has always been acted upon, and it establishes the unqualified doctrine that the relation of counsel and solicitor renders the parties mutually incapable of making any legal contract of hiring and service in regard to litigation. That rule has existed for a long time, and, speaking for myself, I should be very sorry to see it in any way impugned.

1896

*In re*

LE BRASSEUR

AND

OAKLEY.

Lopes L.J.

With regard to the costs of these proceedings, as there have been irregularities on both sides, I think the proper course is to discharge the order, and give no costs on either side.

RIGBY L.J. I agree as to the order which it is proposed to make, and with the reasons already given for it, and especially with what has been said about counsel's fees. I do not think I can usefully add anything.

Solicitors: *Cox & Lafone*; *Le Brasseur & Oakley*.

(1) 13 C. B. (N.S.) 677.

W. L. C.

## NORTON v. DASHWOOD.

[1895 N. 971.]

*Executor and Heir—Will—Heirlooms—Fixtures—Tapestry.*

CHITTY J.

1896

July 3, 4, 7.

Tapestry which had been cut and pieced so as to cover the walls of a room and the spaces left by the doors and mantelpiece, and hung by being nailed to wooden battens let into the plaster and nailed to the brick-work :—

*Held*, to pass as a fixture under a devise of the mansion-house.

*D' Eyncourt v. Gregory* (L. R. 3 Eq. 382) followed.

## TRIAL OF ACTION.

This was an action by one of the executors of the late Sir Edwin Dashwood, a former tenant for life, against Sir Robert Dashwood, the present tenant for life, the infant tenant in tail, and the other executor, claiming accounts, and the delivery over of certain manuscripts, furniture, and chattels, but the only question raised which calls for any notice in this respect was, whether certain tapestry on the walls of a room called the "Tapestry Room," in the family mansion-house at West Wycombe, was a fixture passing under a devise of the mansion-house in strict settlement.

The facts, so far as material and as found by the Court, were as follows :—

The plaintiff, as one of the executors of the late Sir Edwin Dashwood, claimed to remove and take away the tapestry as a chattel. This claim was resisted by the defendant, Sir Robert Dashwood, as tenant for life in possession of the mansion-house.

Both parties claimed under the will of the late Sir George Dashwood, who died in 1862. Sir George, at his death, was entitled to the mansion-house and its contents. By his will, he settled the mansion-house so that it passed on his death to his widow for life, and on her death, in 1889, to Sir Edwin for his life, and on his death, in 1893, to the defendant Sir Robert for his life. He also settled as heirlooms to go with the mansion-house certain articles, part by direct gift, and part through the

CHITTY J. medium of a selection to be made by his trustees. In the first class he included "all and singular the pictures, prints, drawings, books, statuary and bronzes" in or about the house at his death; in the second, "such and so many of the household goods, furniture, and other chattels and effects" in or about the house at his death as the trustees should think fit to select. The trustees, who were two in number, caused an inventory to be made of the household goods, furniture, and chattels. Both signed the inventory, but at different points, for the purpose of shewing which of the chattels were to go as heirlooms under their power of selection. Inasmuch as the power was conferred upon them jointly, the result, as found by the Court, was that so many only of the chattels as were covered by both signatures became heirlooms by virtue of the power; and a declaration to this effect was made in a former action. By virtue of the will, all the chattels in the house, not made heirlooms by direct gift, or through the medium of selection by the trustees, passed to the testator's widow as residuary legatee.

After her death, certain questions in relation to the real estate and the heirlooms arose between Sir Edwin, as tenant for life in possession, and her executors. A suit was instituted in which Sir Edwin was plaintiff, and her executors and others were defendants. In certain particulars delivered by Sir Edwin pursuant to an order made in the action, he claimed the tapestry as an heirloom under the direct gift, adding in a marginal note, that it was fitted to the Tapestry Room, and formed portion of the building. Subsequently, and apparently as part of a compromise, the executors of the widow sold to Sir Edwin all the furniture and chattels in the house which she was entitled to sell. The present claim of Sir Edwin's executor to the tapestry was founded on this sale. The tapestry was not mentioned in Sir George's will, nor was it mentioned in the inventory of heirlooms signed by the trustees; and further, it was not mentioned in the sale. The plaintiff, as executor of Sir Edwin, reversing entirely the position taken up by Sir Edwin himself, now claimed the tapestry as part of the furniture and chattels which passed to the widow as residuary legatee, and to Sir



Edwin as purchaser from her. As against this claim the defendant Sir Robert, taking up the same position as Sir Edwin formerly did, contended, first, that the tapestry passed with the house as a fixture; and, secondly, that if it did not, it passed as an heirloom under the direct gift by virtue of the word "pictures."

Witnesses were examined in Court, and photographs of the Tapestry Room were produced. The result of this evidence is sufficiently stated in the judgment.

*Farwell, Q.C.*, and *T. L. Wilkinson*, for the plaintiff. The tapestry was never a part of the house so as to pass as a fixture. The tapestry is not fixed in the same way as in *D'Eyncourt v. Gregory*. (1) The tenant for life could have removed this tapestry at any time during his occupation: *Ex parte Quincy*. (2) Hangings and wainscot fixed only by screws may be removed: *Leach v. Thomas* (3); *Buckland v. Butterfield*. (4) [*Amos and Ferard on Fixtures*, 3rd ed. p. 125, was also referred to.]

*Byrne, Q.C.*, and *Dunham*, for the defendants. The tapestry is a fixture: it is put up in the only way possible to fix tapestry, and in such a way as to make it a permanent addition to the room. *D'Eyncourt v. Gregory* (1) covers this case. *Cave v. Cave* (5) is in our favour. The tapestry, therefore, passes with the mansion-house, and now belonged to the defendants. It could not be removed without injury, and it would disfigure the room to take it away.

*Farwell, Q.C.*, in reply.

*Cur. adv. vult.*

July 7. CHITTY J., after stating the facts as above, continued:—I proceed to consider the question whether the tapestry passed with the house. It results from what I have already stated that the question arises between the devisee of the house on the one hand, and the residuary legatee on the other hand, both claiming under the same will. In regard to fixtures and a claim to remove them, the law has regard to the

CHITTY J.

1896

NORTON

v.

DASHWOOD.

(1) L. R. 3 Eq. 382.

(3) 7 C. & P. 327.

(2) 1 Atk. 477.

(4) 4 Moore (C.P.) 440.

(5) 2 Vern. 508.

CHITTY J. relation of the parties, and differs according to the nature of that relation. It will suffice to mention three sets of cases. 1896  
NORTON As between landlord and tenant, the claim of the tenant to remove fixtures set up by himself is the most favoured; as v.  
DASHWOOD. between tenant for life and remainderman, the claim of the tenant for life to remove fixtures set up by himself is less favoured; and as between executor and heir, where both claim under the same owner, the claim of the executor to remove fixtures set up by the owner is still less favoured. In former times it has been said that the heir was a favoured person; but, in my opinion, no distinction can be maintained between a claim by the executor against the heir and a claim by the executor against the devisee. The present case falls within the principle of decisions between executor and heir.

In considering any question of fixtures the important circumstances to be regarded are, first, the mode of annexation of the articles and the extent to which it is united with the freehold; secondly, its nature and construction, as whether it has been put up for a temporary purpose, or by way of permanent improvement; and, thirdly, the effect its removal will have upon the freehold. (See Amos and Ferard on Fixtures, 3rd ed. p. 125, and Smith's Leading Cases, 10th ed. vol. ii. p. 208.) The second head, involving purpose or intention, appears to me to have peculiar force where the case arises between executor and devisee. It will readily be perceived that if a man annexes an article belonging to himself to the freehold, an intention or purpose of making the annexation permanent is more easily inferred where the freehold also is his own property than where the freehold is the property of another.

The material facts are shortly as follows. The tapestry has stood on the walls, as it now stands, for at least a century; the room itself has apparently for the same period been known as the "Tapestry Room." The room is a highly ornamented chamber; the decoration of the room, including the ceiling, has been designed and coloured with reference to the tapestry, which is the principal ornament. The tapestry itself and the room are well shewn in the photographs of the three sides of the room capable of being photographed. The tapestry represents

figures of men, women, boys, animals, landscape, and sea. It is thus described in the particulars delivered by Sir Edwin : “Tapestry panel with numerous carts, horses, &c., representing in landscape the Harvest Home ; another panel representing Game at Bowls, &c. ; another panel representing Fish Market.” Sir Edwin himself speaks of “tapestry panel.” Wainscot and its panels pass to the heir : *Cave v. Cave*. (1) The tapestry has been cut and pieced so as to fit and cover the spaces in the walls left by the doors and the mantelpiece. This is well shewn in the photograph of the wall where the chimneypiece stands. Part of the tapestry lies behind the entablature there shewn over the doorway, and to some extent behind the frieze over the mantelpiece. The tapestry appears not to have been designed originally for the room : some additional portions have been added for the special purpose of filling up the wall spaces. Some of the figures on one wall have apparently been copied in the tapestry on another wall. A species of frame following the outline of the wall spaces has been worked in tapestry, so that the tapestry appears to stand in frames. The mode of affixing to the wall is this. Chaces have been cut in the plaster right down to the brickwork ; into these chaces, battens  $2\frac{1}{2}$  inches broad by  $\frac{3}{4}$  inch thick have been placed and securely fixed by strong iron nails firmly driven into the brickwork. The nails, being very old and rusty, are difficult to extract. The tapestry itself is nailed to the batten by old nails about  $\frac{1}{2}$  inch long like modern tacks ; these nails are also rusty. The tapestry itself could not be removed from the walls without suffering injury by tearing ; the removal of the nails holding the battens to the wall would involve some injury to brickwork. The removal of the tapestry, the great feature of the room, would (in the language of the Lord Keeper in *Cave v. Cave* (1)) leave the room “maimed and disfigured.” The tapestry if removed would be comparatively of little use or value as a chattel. Underneath the tapestry is a carved dado in wood suitable to the tapestry itself ; the dado is affixed by screws. The plaintiff does not venture to claim the dado itself : it is plainly part of the room itself. The tapestry could not be got off the walls without

CHITTY J.

1896

NORTON

v.

DASHWOOD.

(1) 2 Vern. 508.

CHITTY J. removing the entablature over one of the doors, and probably  
1896  
NORTON  
c.  
DASHWOOD.  
—  
without removing the frieze over the chimneypiece. On the question of permanent annexation one of the skilled witnesses for the plaintiff admitted that if he desired to fix tapestry permanently to a room he should fix it in the way this tapestry is fixed. The other suggested a cement moulding or something of that description running round the tapestry. The skilled witness called by Sir Robert said that the system actually adopted is that which would now be adopted for permanently fixing the tapestry to the walls.

Upon these facts I hold that the tapestry passed with the devise of the house itself. The case is covered by Lord Romilly's decision in *D'Eyncourt v. Gregory*. (1) That was a case between tenant for life and remainderman. The method of annexation of the tapestry in that case does not substantially differ from the annexation in the present case.

Being of this opinion, it becomes unnecessary for me to decide whether the tapestry would have passed as an heirloom under the word "picture." Had it so passed it would have vested in a tenant in tail by purchase on his attaining twenty-one.

It probably never occurred to the testator, when making the careful dispositions found in his will, or to the trustees, when they signed the inventory of heirlooms, to doubt that the tapestry passed with the house. But these circumstances form no ground for my decision.

Solicitors: *Long & Gardiner; Morse & Simpson.*

(1) L. R. 3 Eq. 382.

W. C. D.



[ *Distinguished.*     *Re* ]  
 [ HAYNES.             ]  
 [ (1949) 1 Ch. 5 ]

*In re* BREWER'S SETTLEMENT.  
 MORTON v. BLACKMORE.

CHITTY J.

1896

July 8, 9, 15.

[1895 B. 4967.]

*Settlement of Settlor's own Property—Determinable Life Interest—Forfeiture—  
 Breach of Trust—Bankruptcy—"Cease to be Payable."*

By a settlement of 1878, property of the settlor was assigned by him to trustees upon trust to pay the income to him until his death or bankruptcy, or until he should "assign charge or incumber the said income or do or suffer anything whereby the same or some part thereof would through his act or default become payable to or vested in some other person or persons," with remainder in favour of the children of the marriage. In 1887 the settlor induced the surviving trustee to lend him the greater part of the trust fund, and the money thus obtained was spent by him for his own purposes. In 1891 the settlor became bankrupt. Proceedings were subsequently taken on behalf of the children of the marriage with the result that the funds lost by the breach of trust were replaced, and the question now raised was, whether the settlor's interest had been forfeited prior to the bankruptcy by the dissipation of the trust fund:—

*Held*, that the settlor's interest had not been determined prior to the bankruptcy; and that, as the limitation until bankruptcy was void as against his creditors, his life interest passed to the trustee in bankruptcy, and that the income of the trust fund was now payable to a purchaser from the trustee during the life of the settlor.

*Semle*: Had the settlement contained a limitation over if the income should "cease to be payable" to the settlor, the dissipation of the trust fund would have worked a forfeiture.

ADJOURNED SUMMONS.

By a settlement of May, 1878, made prior to and in contemplation of marriage, reversionary property of the settlor, E. H. Brewer, which eventually realized about 1000*l.*, was assigned by him to trustees, upon trust after the said marriage for investment, and to pay the income to the said E. H. Brewer "until he should die or be outlawed or become bankrupt or institute proceedings in bankruptcy for liquidation by arrangement or composition with his creditors or should assign charge or incumber the said income or do or suffer anything whereby the same or some part thereof would through his act or default or by operation or process of law or otherwise if belonging absolutely to him become payable to or vested in some other

CHITTY J. person or persons"; and, after the determination of this trust, 1896  
 ~~~~~  
In re
 BREWER'S
 SETTLEMENT.
 MORTON
v.
 BLACKMORE.
 —

the income was to be paid to the intended wife for her life, with remainder in favour of the children of the marriage at twenty-one or marriage in the usual way.

In June, 1887, the reversionary property fell into possession, and was received by the defendant Blackmore, the sole surviving trustee. In November, 1887, and subsequently, but prior to the bankruptcy, the defendant Blackmore advanced to the settlor considerable sums, part of the capital of the trust funds, and amounting to 685*l.*; the only security taken for these advances was a covenant by the settlor and his wife (since deceased) to repay the principal of the loans and to indemnify the trustee. The money thus lent was applied by the settlor for his own purposes, and for the maintenance of his wife and children. This part of the trust fund was thus dissipated and ceased to exist.

In October, 1891, E. H. Brewer, the settlor, was adjudicated a bankrupt.

In January, 1893, an action was commenced on behalf of the children of the marriage against the defendant Blackmore, to compel him to make good the loss occasioned by his breach of trust, with the result that the money was replaced and invested, and new trustees appointed.

In March, 1893, the defendant Blackmore, in consideration of 5*l.* paid by him to the trustee in the bankruptcy of the said E. H. Brewer, obtained an assignment of all and every the share and interest then vested in the vendor as trustee of the said E. H. Brewer in the property comprised in or then by any means remaining subject to the trusts of the settlement.

The defendant Blackmore claimed to be entitled to be paid the income of the trust fund during the life of the settlor, E. H. Brewer, and the present trustees of the settlement now applied by originating summons, to which Blackmore and the children of the marriage were made defendants, for the determination of the following questions: (1.) whether in the events which had happened the life interest of the said E. H. Brewer in the trust funds of the settlement had determined before the date of the bankruptcy, and (2.) whether the income thereof ought to

be paid to the defendant Blackmore, or ought to be applied for the maintenance and benefit of the infant defendants. CHITTY J.

Farwell, Q.C., and *St. John Clerke*, for the trustees, stated the facts.

Levett, Q.C., and *Ribton*, for the defendant Blackmore. The limitation until bankruptcy was void as a fraud on the bankrupt law: *In re Detmold* (1); the settlor's life interest, therefore, was not determined by his bankruptcy, and, subject to the question whether what was done prior to the bankruptcy amounted to a forfeiture, this life interest passed to the trustee in the bankruptcy, and is now vested in the defendant Blackmore as a purchaser from him. A mere breach of trust which may render the income liable to be impounded under the Trustee Act, 1893, s. 45, will not work a forfeiture; by borrowing the capital on his personal covenant the settlor did not make the income payable to any one else; it did not amount to an alienation of the income. The present case is different from *In re Sartoris's Estate*. (2) There was no forfeiture prior to the bankruptcy; and the defendant Blackmore is now entitled to receive the income of this fund during the life of the settlor.

Byrne, Q.C., and *St. John Clerke*, for the infants. By what was done the income or "some part thereof" became payable to or vested in some other person or persons; by dissipating the trust fund in this way the settlor alienated the income; he certainly made it payable to some one else. The income of that part of the fund ceased to be payable to him any longer.

[CHITTY J. The settlement contains no such words.]

That is only another form of expression for alienating the income. The settlor's life interest had been forfeited prior to the bankruptcy.

Levett, Q.C., in reply.

Cur. adv. vult.

July 15. CHITTY J. By the settlement of 1878, property was assigned by E. H. Brewer to trustees upon trust to pay the income to himself, the settlor, until his death, or his becoming bankrupt, or the happening of other events specified. He

(1) 40 Ch. D. 585.

(2) [1892] 1 Ch. 11.

1896
In re
 BREWER'S
 SETTLEMENT.
 MORTON
v.
 BLACKMORE.

CHITTY J. became bankrupt in 1891. The limitation until bankruptcy being void as against his creditors in bankruptcy, his life interest was not determined by his bankruptcy, but, subject to the question presently mentioned, passed to the trustee in bankruptcy, and is now vested in the defendant Blackmore as purchaser from the trustee in bankruptcy.

1896
In re
 BREWER'S
 SETTLEMENT.
 MORTON
v.
 BLACKMORE.
 —

The question is whether the life interest had determined previously to the bankruptcy. The other events specified in the limitation of the life interest were (so far as material) until he (the settlor) should "assign charge or incumber the said income or do or suffer anything whereby the same or some part thereof would through his act or default or by operation or process of law or otherwise if belonging absolutely to him become payable to or vested in some other person or persons." These limitations are valid; consequently, if any of these events happened before the bankruptcy the life interest was determined. The facts on which the question arises are as follows. [His Lordship having stated the facts, continued:—]

The effect of these transactions has now to be considered. On behalf of the infants it was contended that the life interest had ceased, or, to use the more common phrase, had been forfeited, and reliance was placed on the words "the income or some part thereof" would "become payable to or vested in some other person or persons." But to or in what other person would it have become payable or vested had it belonged to the tenant for life absolutely? And when would it, on the same hypothesis, have so become payable or vested? Certainly not on the occasion of the money being lent. For the purpose of the present question it appears to me to be immaterial whether the loans were breaches of trust or not. Undoubtedly they were breaches of trust. The tenant for life was liable to replace the fund, but without interest; the income still belonged to himself and to no one else. So long as the money was in his hands and capable of being followed, the money itself might have been recovered from him, but the right to the income did not pass from him. After he had spent it in the manner described, it could no longer be followed: the tradesmen and others to whom he paid it were, undoubtedly, pur-

chasers for value without notice; the money in their hands ceased to have any existence as a trust fund. I think that it would be an extravagant refinement to say that every sovereign as he paid it away still remained part of the trust fund and was producing an income, and that such income was payable to or vested in the persons who had received the sovereign or other the money thus paid away. In my opinion, after the money had in the first instance been lent, and subsequently after it had been spent, the income of the trust fund did not become payable to or vested in any person or persons other than the tenant for life.

CHITTY J.
1896
In re
BREWER'S
SETTLEMENT.
MORTON
v.
BLACKMORE.

The case no doubt is peculiar; I am not aware that there is anything like it in the books. In construing clauses of cesser or forfeiture such as that before me, the Court is not at liberty to depart from the language of the document. The words "or cease to be payable to himself" are not in the settlement; and I find myself unable to say that, by any just method of construction applicable to such clauses, I ought to supply those words. Had they been there, the case would have stood differently. A point was raised at the Bar as to the right to an order for impounding the income, and reference was made to the 45th section of the Trustee Act, 1893. But no such order was in fact made; nor could it have been made effectually; any such order would have worked a cesser of the life interest.

The result is that I hold the life interest had not determined previously to the bankruptcy.

A declaration was accordingly made to this effect, and that the income of the trust fund was now payable to the defendant Blackmore for the residue of the life of the settlor.

Solicitors: *A. M. Bradley; Woodbridge & Sons.*

W. C. D.

CHITTY J.

In re LEES' SETTLEMENT TRUSTS.

1896
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 July 18.

*Practice—Trustees—Vesting Order—Reduction of Number of Trustees—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 35.*

Where one of four trustees was an absconding bankrupt, the Court made an order vesting the trust estate in the other three trustees, although the number of trustees was thereby diminished.

## PETITION for a vesting order.

By an ante-nuptial settlement of September 4, 1882, the intended husband covenanted with the four trustees therein named to pay a sum of 10,000*l.* to them six months after the marriage, with interest at 4*l.* per cent. from the marriage, and also that if the 10,000*l.* should not be paid as aforesaid, that he would pay interest thereon at 4*l.* per cent. half-yearly, and that all his share and interest, whether vested or contingent, of and in certain real estates therein mentioned, should stand charged with the payment to the trustees of the said 10,000*l.* and interest. The trusts of this 10,000*l.* and interest were declared by another settlement of even date.

By another ante-nuptial settlement, also dated September 4, 1882, the trusts of this 10,000*l.* and of 5000*l.* South Australian Bonds (the property of the intended wife) were declared.

In 1891 one of the four trustees was adjudicated a bankrupt and absconded, and his whereabouts was unknown. The 10,000*l.* was still outstanding, and the 5000*l.* South Australian Bonds were deposited in the joint names of the four trustees at the bank of Messrs. Coutts & Co. The said bonds were payable to bearer and passed by delivery.

The husband and wife and the three continuing trustees now applied by petition under the Trustee Act, 1893, ss. 26, 35, that the right to sue for and recover the said sum of 10,000*l.*, and the interest from time to time to become due for the same, and the benefit of all securities for the same, including the charge created by the first-mentioned settlement on the share and interest of the husband in the real estate therein mentioned,

might vest in the three trustees, to be held by them upon the trusts of that settlement, and that the right to sue for and recover the South Australian Bonds for 5000*l.*, and any interest from time to time to become due in respect thereof, and all other choses in action (if any) subject to the trusts of the second settlement, might vest in the three trustees, to be held by them upon the trusts of that settlement.

Having regard to the fact that there were three continuing trustees, it was submitted by the petition that it was not necessary to appoint a new trustee in the place of the absconding trustee.

*Bryan Farrer*, for the petitioners. The old practice of refusing to make a vesting order without first appointing a new trustee in the place of the discharged or absconding trustee, as settled by *In re Gardiner's Trusts* (1), has been altered by the Trustee Act, 1893. Sect. 26 (ii.) provides that "where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person, (*b*) is out of the jurisdiction, or (*c*) cannot be found," the Court may make an order "vesting the land in any such person in any such manner and for any such estate as the Court may direct"; and then at the end of the section it is provided, "(*b*) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person." The Court will not now insist on "some other person" being brought in, though the result be a diminution in the number of trustees. By s. 50, "land" includes "any interest therein." Sect. 35 provides in similar terms for vesting orders as to stock and choses in action.

The jurisdiction created by the Trustee Act, 1893, is much wider than that under the earlier Acts.

An order very like the one I now ask for was made under the Lunacy Act, 1890, ss. 135, 136, where the words are similar to the words of ss. 26 and 35 of the Trustee Act, 1893:

(1) 33 Ch. D. 590.

CHITTY J.

1896

*In re*

LEES'

SETTLEMENT  
TRUSTS.

CHITTY J. *In re Leon*. (1) A similar order has also been made in  
1896 *Dugmore v. Suffield*. (2)

*In re*  
LEES'  
SETTLEMENT  
TRUSTS.  
—

CHITTY J. Sects. 26 and 35 of the Trustee Act, 1893, are  
very wide in their terms, and I think I have now jurisdiction to  
make this order as asked.

Solicitors : *Farrer & Co.*

(1) [1892] 1 Ch. 348.

(2) W. N. (1896) 50 (13).

W. C. D.



FREWEN *v.* LAW LIFE ASSURANCE SOCIETY.

NORTH J.

[1895 F. 1594.]

1896

June 20, 27.

*Will—Devise of Onerous and Beneficial Property—Tenant for Life—  
Mortgage—Interest.*

A tenant for life of estates settled by will

*Held*, bound to keep down interest in respect of charges on the several parts of the estates out of the income of the whole.

THIS was the trial of an action raising, between tenant for life and remainderman of estates settled by will, the question whether the tenant for life was bound to apply the surplus income of portions of the devised estate, after satisfying the interest on the mortgages thereon, in paying interest on mortgages upon other portions of the estate comprised in the same devise, the separate income of which was insufficient to satisfy such interest. The plaintiff was the first tenant in tail male expectant on the death of his father, the tenant for life under the will; the defendants were assigns of the life estate of the father of the plaintiff.

The settlor, Thomas Frewen, died in 1870 possessed of real estates in England and in Ireland. Having bequeathed certain pecuniary legacies and annuities which were charged on a portion of his English estates, he devised his English estates by the description of his manors, lands, tenements, and hereditaments of freehold and copyhold tenure in the several counties of (naming six counties), and also the advowsons of (naming nine advowsons), and all other his freehold estates in England to trustees for a term of 2000 years. Subject to the trusts of the term he devised his English estates to the use of his second son Edward Frewen for life, with remainder to the first and other sons of Edward Frewen successively in tail male. He declared the trusts of the term of 2000 years to be "in case my personal estate not otherwise disposed of by this my will shall be insufficient to satisfy my debts, funeral and testamentary expenses, and the pecuniary legacies hereinbefore and hereinafter bequeathed, then by mortgage of the hereditaments

NORTH J.

1896

FREWEN

v.

LAW LIFE  
ASSURANCE  
SOCIETY.

comprised in the said term or any part thereof to raise in aid of my personal estate so much money as shall be sufficient to satisfy the same debts, expenses, and legacies, and to pay such money to my executors or administrators, who shall apply the same accordingly."

The testator also settled his real estates in Ireland as to part on his third son for life with remainders over, and as to part on his fourth son for life with remainders over.

He gave the trustees of the term a power of sale (with directions for reinvestment) over all his English estates, except his mansion-houses of Brickwall House and Cold Overton, and the parks and pleasure-grounds thereto respectively attached, and his lands and hereditaments in the parishes of Cold Overton and Northiam, including as part thereof the manorial rights and advowson of Cold Overton. He also bequeathed legacies to a large amount in the nature of portions for the benefit of his children charged upon all his English estates.

The will contained a declaration that the trustees of the term of 2000 years should stand possessed of the estates on trust to allow the trustees for the general purposes of the will out of the income by mortgage to raise and discharge legacies, portions, debts, interest, and expenses, and it was provided that the net rents and profits of the English estates, "so long as the said several legacies or portions, and the moneys to be raised by mortgage in the same manner hereinbefore provided, or any part thereof, shall remain unpaid and unsatisfied," should be divided into two equal parts; one of which should be retained by the tenant for life, and the other paid by him to the trustees of the will, to be applied by them, after satisfying interest on mortgages, in maintenance of younger children and interest on unsatisfied portions, and in creating a fund for the discharge of incumbrances.

The incumbrances on the testator's English estates comprised, in addition to various paramount charges, mortgages to the extent of 63,000*l.* on different parts of the estate created by the testator; mortgages to the extent of 100,000*l.* created, by the trustees of the term of 2000 years limited by the testator's will, on different parts of the property; annuities given by the

will, some of the annuitants being very old; and charges under the Improvement of Land Act, 1864, created by Edward Frewen, the tenant for life, and terminable at various dates, the earliest of which was 1903.

Edward Frewen, the testator's second son, in 1881 mortgaged his life estate in the English estates to the defendant society, who have since foreclosed. In 1884 an action was instituted for administration of the estate. In 1885 Edward Frewen, the tenant for life, was appointed receiver in that action. On June 12, 1891, an order was made under which the defendant society were let into possession of the estate.

The defendants had recently gone out of possession of part of the estate, leaving interest on incumbrances affecting that part of the estate unpaid, and had given notice of their intention to abandon other parts of the estates.

The plaintiff claimed a declaration that, as between the defendant society as assignee of the tenant for life, and the plaintiff as remainderman, the interest and annual charges in respect of the charges paramount to the life estate affecting every part of the devised estates ought to be kept down out of the rents and profits of the estates as a whole, and that any surplus of the rents and profits ought to be applied as directed by the will.

*Swinfen Eady, Q.C.*, and *Dauney*, for the plaintiff. In this case the testator has aggregated his English estates, and throughout his will shewn an intention to have them kept together. The tenant for life is bound to keep the whole of the property together, and may not take part and reject the rest: *Guthrie v. Walrond* (1); *In re Hotchkys*. (2)

*Vernon Smith, Q.C.*, and *Methold*, for the defendants. We submit that the testator has not so aggregated the English estates as to throw on the tenant for life the burden of keeping down all the charges on all estates. The case of *Guthrie v. Walrond* (1) was a simple case where leaseholds were bequeathed in a lump. In *In re Hotchkys* (2) the point actually decided was that trustees of two properties under one trust were bound

NORTH J.

1896

FREWEN

v.

LAW LIFE  
ASSURANCE  
SOCIETY.

(1) 22 Ch. D. 573.

(2) 32 Ch. D. 408.

NORTH J. to keep in repair one property which was not at the time remunerative, subject to the adjustment of the rights between the equitable tenant for life and remaindermen. The judges did express their opinion also that interest on a mortgage on one property ought to be kept down out of the income of the other property if necessary, subject also to adjustment of rights between the tenant for life and remaindermen. That case differs from the present in that the life estate was equitable. *Syer v. Gladstone* (1) rather tends to our view. In *Lord Kensington v. Bouverie* (2) it was held that a tenant for life who had paid interest on a mortgage in excess of rents could not get anything back—that is to say, it was a payment he was not bound to make.

1896  
 FREWEN  
 v.  
 LAW LIFE  
 ASSURANCE  
 SOCIETY.

Even if the tenant for life is not at liberty to throw up what part of the estate he pleases, the Court will look into the circumstances of each property ; and if it is found that it would be for the benefit of the inheritance as a whole that any particular property should be abandoned to the mortgagees, the Court will allow the tenant for life to give up possession of such property.

*Swinfen Eady, Q.C.*, in reply.

NORTH J. (after stating the facts). The question arises what the rights of the parties are. What the plaintiff contends for is that the English estates themselves—I do not say the Irish estates: those are given to different persons altogether—are given as a whole, and the person who is tenant for life, or stands in the shoes of the tenant for life as to the receipt of the income of the English estates, is bound to apply the aggregate income, as far as it will go, in paying the interest upon all the existing mortgages; so that although in the case of one particular estate the income is more than sufficient to pay the interest, the surplus income arising from that would be applicable to meet, or towards meeting, the interest upon the other mortgages; or, in other words, the plaintiff's argument treats the income as a whole, and the charges as a whole, for this purpose, to be paid out of that income, so far as it will go.

(1) 30 Ch. D. 614.

(2) 7 H. L. C. 557.



The defendants' contention is that each of these properties is to be dealt with separately. They admit that as tenants for life they are bound to keep down the interest upon each mortgage so far as the income derived from that particular estate suffices for the purpose; but they deny that they are under any liability to apply the surplus income arising from one property towards the payment of interest upon some other property.

Now I think it is quite clear that, on reading the will, the English estates are devised as a whole, and the income of those estates is given as a whole; and it is impossible for the tenant for life or any other person to split that whole into portions, dividing the land either into the land in one county or parish as distinguished from the land in another county or parish, or the land comprised in one mortgage as distinguished from the land in another mortgage. It is one whole, with respect to which the testator has expressed his intention that the property is to pass under certain limitations which make the tenant for life liable to pay the mortgages. The direction was to divide the net rents and profits, which indicates what is available after keeping down the charges upon the property which the tenant for life has to keep down. But, independently of the use of that term "net profits," the tenant for life coming here into an estate charged with incumbrances is bound by the general law to keep down the interest on the incumbrances. That is admitted by both the plaintiff and the defendants, subject to the particular question between them.

Then the question is, first, what the law on the subject is; and three or four cases were cited. The first is *Guthrie v. Walrond*. (1) There, one of the gifts by the testator's will was: "I give to my third son, W. M. Guthrie, all my estate and effects in the Island of Mauritius absolutely if he shall attain the age of twenty-five years, or die under that age leaving male issue living at his death." It will be noticed that there the devise is of all his estate in Mauritius, corresponding exactly in form with the devise here of all the estate in England. The question was with respect to the testator's property in the Island of Mauritius, which consisted in part of an onerous

NORTH J.

1896

FREWEN

v.  
LAW LIFE  
ASSURANCE  
SOCIETY.

NORTH J. lease—whether the devisee could disclaim that lease, and accept the rest of the gift; or whether he must either disclaim or accept the whole. Fry J. says in his judgment (1): “It appears to me plain that when two distinct legacies or gifts are made by a will to one person he is, as a general rule, entitled to take one and disclaim the other, but that his right to do so may be rebutted if there is anything in the will to shew that it was the testator’s intention that that option should not exist”; but it will be observed that he is speaking there, to begin with, of two distinct legacies or gifts. “For there are cases in which the Court has held that a legatee has no right to take one gift and leave another, because it has discovered an intention on the part of the testator to couple the two estates together. But in the present case the question arises upon a single and individual gift”—that being a gift of all his property and effects in Mauritius—“and it appears to me that such a gift is *primâ facie* evidence that it was the testator’s intention that the gift shall be one, and that the legatee shall either take it all or take none of it. It may be that even in such a case the Court would sometimes be able to discover some subtle indication of an intention that the legatee should be at liberty to take part of the gift and leave the rest, but I think that *primâ facie* the fact that there is only one gift is an indication of an intention that the legatee shall take either the whole or none at all.”

The next case referred to in order of date was *Syer v. Gladstone*. (2) The head-note looks something like the present case; but I have read the case carefully, and I cannot find anything to justify that head-note. I have looked at the report of the same case in 34 *Weekly Reporter*, 565. I find a similar head-note, and the judgment, which is somewhat shorter, is to the same effect as it is in the LAW REPORTS.

[His Lordship commented on the facts appearing in the report of *Syer v. Gladstone* (2), and read the judgment of Pearson J., and proceeded:—]

I think that the decision really was that persons who had received the benefit of the enjoyment of property left them for life, which was subject to a mortgage paid off by their testator’s

(1) 22 Ch. D. 577.

(2) 30 Ch. D. 614.

executors, were bound to indemnify the estate in respect of the equivalent of interest on the mortgage money to the extent of the benefit they had received, but were not bound to put their hands in their own pockets, and from their other resources pay the difference between the annual value of the property itself and the total amount of interest upon the mortgage debt. The subject of the head-note is not referred to in the arguments or judgment, and does not appear to me to have been decided, or to have arisen, in the case at all.

I may add that, if the facts in *Syer v. Gladstone* (1) had been such as to justify the head-note, it is a case where the judges of the Court of Appeal in *In re Hotchkys* (2) considered that there were two distinct gifts; and, if so, the case is no authority as to the present case.

Another case cited was *In re Hotchkys* (2) before the Court of Appeal. [His Lordship stated the facts of that case, and read from the judgment of Cotton L.J. the paragraph at the lower part of page 417 and top of page 418, and the final paragraph, and also read the judgment of Lindley L.J., ending at the sentence: "I agree with Cotton L.J. *Guthrie v. Walrond* (3) is more applicable to this particular devise than the case of *Syer v. Gladstone* (1), which is to be explained by the fact that according to the proper construction of the will in that case there were two gifts." And he added that the accuracy of the head-note was assumed.]

That being so, it seems to me that the cases of *Guthrie v. Walrond* (3) and *In re Hotchkys* (2) clearly apply to this, and that the testator has by his will given his English estates as one undivided whole; and the person who is in possession as representing the tenant for life is not entitled to split it up and say that he will take part of it with its benefits, free from the burdens which fall upon another part.

Then there is another matter that is not wholly immaterial: namely, that in the present case to a very large amount these mortgages are mortgages for which the testator's estate is liable, and with respect to which, therefore, the dispositions in the will have to be looked at and borne in mind.

(1) 30 Ch. D. 614.

(2) 32 Ch. D. 408.

(3) 22 Ch. D. 573.

NORTH J.

1896

FREWEN

v.

LAW LIFE  
ASSURANCE  
SOCIETY.

NORTH J.

1896

FREWEN

v.

LAW LIFE  
ASSURANCE  
SOCIETY.

Then it is said that it would be absurd to say that if the English estates had been divided among different tenants for life the contention now set up by the plaintiff could prevail. I agree. It is just because they are not given to different tenants for life, but given to one person as a whole, that the contention of the defendants, it seems to me, cannot prevail.

Then there was one other point raised, which was this. Taking the case of a mortgagee whose security was insufficient, it was said that all that he could claim by law would be to enter into possession and take the rents and profits. That is the utmost he could get, especially in cases where there is no liability on the part of the testator's estate, as is the case with respect to the 100,000*l.* raised by the trustees of the term created by the will; and it is said that this is the utmost extent of his right, and there is no reason why the tenant for life should pay, or be under any obligation to pay, to the mortgagee what he has no right to under his security. I am not satisfied that the proposition is right. It may be perfectly right and fair that he should do so when we regard the benefit of the testator's estate which is charged in this way for the purpose of preserving the estate. It is very much for the benefit of the estate that the mortgagees should not enter into possession; and, therefore, it may be a very good reason for the testator having said, rather than that the mortgagees should be induced to enter into possession by reason of the non-payment of interest, he would provide for payment of interest to them for the benefit of his estate out of the income of the other parts of his estate, although their own specific securities did not give them a charge upon such other parts.

But, in the next place, I am not satisfied that the construction contended for, namely, that the mortgagees are not entitled to claim the benefit of the provisions in the will, is right. There was a case, not dissimilar from this, of *In re Fitzgerald's Settlement*. (1) [His Lordship stated the effect of *In re Fitzgerald's Settlement* (1), and said:—]

That case goes some way to shew that in the present case the mortgagees are within the trusts of the will entitled to be



called cestuis que trust; but even if they are not, the passage I am going to read from Cotton L.J.'s judgment shews that the obligation to carry out provisions as to the mortgages is not affected. [His Lordship read from the judgment of Cotton L.J. the paragraph beginning at the bottom of page 23, and continued:—] But the learned judge proceeds to point out, in a passage commencing near the bottom of page 24, that there was a trust for the benefit of the mortgagees, so that they should not be obliged to become mortgagees in possession.

Therefore the disposition made by the settlor (in that case by a voluntary settlement, and in the present case by will) is one in which the settlor may well have had in consideration the prevention of mortgagees being driven into possession—which, as the Lord Justice says, is a most inconvenient and perilous position. In *In re Fitzgerald's Settlement* (1) there were trustees of a term who had to accumulate money for the purpose of discharging mortgages, and they were the persons who were directed to pay it; but it seems to me it can make no difference whatever whether the mode by which the settlor's intention is to be worked out is by an express trust through the medium of trustees, or is by a devise of property for life with remainder over, carrying with it well known legal liabilities which subsist and bind the property just as much as if they had been expressly mentioned in the instrument creating it.

Under these circumstances I come to the conclusion that the contention of the plaintiff is right, and that he is entitled to have the whole rents, treated as one sum, applied towards payment of interest on all the mortgages; and that the defendants are not entitled to split up the estates, and to say that each estate is to be taken by itself, and dealt with separately.

Solicitors for plaintiff: *Collisson & Prichard*.

Solicitors for defendants: *Walters, Deverell & Co.*

(1) 37 Ch. D. 18.

D. P.

NORTH J.

1896

FREWEN

v.

LAW LIFE  
ASSURANCE  
SOCIETY.

NORTH J.

1896

June 5;  
July 10.

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*Ex parte* NEW ORMONDE CYCLE COMPANY,  
LIMITED.

*Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 87—  
Register of Trade Marks—Change of Name of Proprietor.*

Where a limited company being the registered owner of a trade-mark changes its name, it is the duty of the comptroller on request to substitute the new name for the old name on the register.

In November, 1894, the name of a limited company called "The St. Andrew's Cycle Company, Limited," was duly changed, in accordance with the provisions of the Companies Acts, to "The New Ormonde Cycle Company, Limited." The St. Andrew's Cycle Company, Limited, were, at the time of their change of name, the registered owners of the trade-mark "The Ormonde Cycle."

This was a motion on the part of the New Ormonde Cycle Company, Limited, that leave might be given to alter the registration of the above-mentioned trade-mark, so that the name of the applicants might be inserted on the register instead of the name "The St. Andrew's Cycle Company, Limited."

The following are the material provisions of the Patents, Designs, and Trade Marks Acts, 1883 to 1888:—

Sect. 78: "There shall be kept at the Patent Office a book called the Register of Trade Marks, wherein shall be entered the names and addresses of proprietors of registered trade-marks, notifications of assignments and of transmissions of trade-marks, and such other matters as may be from time to time prescribed."

Sect. 87: "Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade-mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade-mark, in the Register of Patents, Designs, or Trade Marks, as the case may be."

Sect. 90, sub-s. 1: "The Court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person or of any other particulars from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making expunging or varying the entry, as the Court thinks fit."

NORTH J.

1896

Ex parte  
NEW  
ORMONDE  
CYCLE  
COMPANY,  
LIMITED.

Sect. 92, sub-s. 1: "The registered proprietor of any registered trade-mark may apply to the Court for leave to add to or alter such mark in any particular, not being an essential particular within the meaning of this Act, and the Court may refuse to grant leave on such terms as it may think fit."

*John Cutler*, for the applicants. I submit, in the first place, that it being the duty of the comptroller under s. 78 of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, to keep a register of trade-marks with the names and addresses of the owners, it is his duty to keep the correct names and addresses; and therefore he has implied power on the change of name or address of the owner to amend the register in that respect. In the alternative, I say that the name of the owner is a non-essential particular, part of the trade-mark, and therefore the Court has power, under s. 92, sub-s. 1, to amend the registration by altering the name to the present correct name. This view has been acted on in *In re National Wholesale Tea Supply Association*. (1)

NORTH J. I have some difficulty in saying that there is power to alter the register as asked under the words of either of the sections referred to. Sect. 92 applies to alterations in some particular in the trade-mark; the registered name of the company is not part of the trade-mark. I will see the comptroller on the subject; in the meanwhile the motion can stand over.

July 10. The motion was now brought on again, counsel for the comptroller having in the meantime been instructed to appear.

(1) 10 Rep. Pat. Cas. 164.

NORTH J.

1896

*Ex parte*  
NEW  
ORMONDE  
CYCLE  
COMPANY,  
LIMITED.

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*John Cutler*, for the applicants. Sect. 90, sub-s. 1, of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, empowers the Court, where any person is aggrieved by what amounts to a misdescription on the register, to vary the register in respect of the name of the owner or any other particular. That power seems to cover the present case: *In re Patent Plumbago Crucible Co.* (1) I contend, further, that by a change of name carried out by legal means there is in effect a devolution of title such as is contemplated by s. 87. The trade-mark which was the property of the St. Andrew's Cycle Company, Limited, has become the property of the New Ormonde Cycle Company, Limited; therefore it is the duty of the comptroller on request and proof of title to cause the latter name to be entered on the register as the proprietors.

*Ingle Joyce*, for the comptroller. The Board of Trade are desirous of assisting the applicants, but they feel that there is some difficulty in holding that this case is within the strict language of any section relating to the alteration of the register. In the cases where such alteration has been made the difficulty does not seem to have been fully discussed. It is only reasonable that the alteration should be made if the Court is of opinion that the alteration can be made, either by the Court under s. 90, sub-s. 1, or by the comptroller under s. 87, which does apply to analogous cases. It would be more convenient that an alteration such as this should be made as of course by the comptroller without the expense of an application to the Court. It must be admitted, however, that it is difficult to see how there has been any change of ownership by operation of law because there has been a voluntary change of name.

NORTH J. The view I take is that the comptroller can do what he is asked to do under s. 87; and that, I think, is clearly the most convenient course to be adopted. Sect. 87 provides that the comptroller may on proof of title to his satisfaction cause the name of the person to be entered as proprietor. It is obviously convenient that the comptroller should be the person before whom any question of formal proof of change of name by

(1) 7 Rep. Pat. Cas. 282.



marriage or by an Act of Parliament or otherwise should be brought. Then is it within the powers of this section? It is quite clear that the thing ought to be done. If it cannot be done, there is an omission in the Act. It is clear that if a company which is the proprietor of a patent changes its name, or if a lady who is the proprietor of a patent changes her name by marriage, the object and intention of the statute is that the name of the proprietor should appear on the register; and that is the present name of the company or person—not the name that the company or person may have had in some time past, but which for every other purpose has been given up ever since the legal change of name, or the marriage, took place.

I do not think that the case comes within s. 90, because the power to make an order under that section seems to me to arise only where there is a person aggrieved by the omission without sufficient cause of something which the law requires to be put on the register; and it cannot be said that a person is aggrieved by the omission of his name without sufficient cause, if the Act does not contain any provision authorizing the insertion of that name. I think you would have to put a forcible construction upon that section to arrive at this result. It seems to have been done in three or four cases: once by Stirling J., and by myself on one occasion; but I know that neither before Stirling J., with whom I have conferred on the subject, nor myself, was the point argued. I believe what Mr. Ingle Joyce says, that it never was decided by any judge in any case. I feel much less difficulty in saying that it comes under s. 87 than under s. 90. When one looks at s. 78 and s. 87 together, it is quite clear what the Act contemplates. What is intended is that the register shall contain a perfect record, complete up to date, of the names and addresses of the proprietors of the trade-marks. It is for the public benefit that the register is kept, and it ought to be kept correct up to date. I think that the case comes within the 87th section. If it is necessary to apply any particular word to it, I think that when the company does, in the mode prescribed by law, proceed to give up one name and take another, the name of the new company ought, by reason of what has taken place by

NORTH J.

1896

*Ex parte*  
NEW  
ORMONDE  
CYCLE  
COMPANY,  
LIMITED.

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NORTH J. such operation of law, to appear on the register, and the register ought to be altered.

1896

*Ex parte*  
NEW  
ORMONDE  
CYCLE  
COMPANY.  
LIMITED.

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It was suggested that the change of name of the company is not by operation of law at all, but that it is by reason of the company voluntarily choosing to change its name, and so in the case of the lady voluntarily choosing to marry a husband whose name is different from her own; but the fact that it is voluntary does not prevent it being within the section. An assignment is voluntary—at least many assignments are; and yet the alteration of name effected by an assignment from A. to B. is a thing which is to call this section into play. It seems to me that when the present legal name of the proprietor ceases to be on the register the new legal name of the proprietor ought to be placed upon it. I think it is within the power of the Court to do this under the 87th section, and the mode of doing it is, under that section, by applying to the comptroller; and as a matter of course when I say apply to him, it shews in my opinion that he has power, when the application is made, to act upon it, and make the necessary alteration. If he should refuse to make it, application could then be made to the Court under s. 90.

Solicitors: *R. E. Campbell; Solicitor to the Board of Trade.*

D. P.

*In re* VEUVE MONNIER ET SES FILS, LIMITED.

*Ex parte* BLOOMENTHAL.

[00352 of 1894.]

C. A.

1896

June 6, 8, 9.

*Contributory—Certificate that Shares are fully paid up—Estoppel.*

B. lent to a limited company 1000*l.* on its promissory note on the terms that the company should give him collateral security on 10,000 fully paid-up 1*l.* preference shares, and that if the company should wish to pay off any part of the amount B. was to return shares at the same rate at which he had taken them. The company handed to B. certificates for 10,000 shares, which certificates stated that B. was the registered holder of them, and that they were fully paid up. They were in fact shares on which nothing had been paid. The company sold some of these shares, and B. executed transfers of the shares sold. His name remained on the register for the remainder when an order was made for winding up the company, and he was placed on the list of contributories in respect of them. B. applied to have his name struck out from the list of contributories on the ground that the company were estopped by the certificates from denying that the shares were fully paid up:—

*Held* (affirming the decision of Vaughan Williams J.), that as B. knew that the shares were the property of the company, that they had not been transferred to him, and that they had not been fully paid up by himself, he knew facts enough to lead any one who considered them to the conclusion that the shares were not fully paid up; that he, therefore, could not rely on the certificates as an estoppel, and that he must remain on the list of contributories.

THIS was an appeal by F. Bloomenthal from a decision of Vaughan Williams J., refusing an application to strike his name out of the list of contributories.

The company was registered on May 16, 1890, with a nominal capital of 100,000*l.* divided into 1*l.* shares, of which 40,000 were preference shares with a cumulative dividend. But few shares were taken by the public. Bloomenthal, who was a wholesale stationer, became connected with the company by printing for them and supplying them with stationery.

In February, 1894, the secretary of the company asked Bloomenthal to lend the company 1000*l.* It was ultimately agreed verbally between Bloomenthal and the managing director that Bloomenthal should lend the company 1000*l.* on the terms

C. A.  
1896  
*In re*  
VEUVE  
MONNIER  
ET SES FILS,  
LIMITED.  
*Ex parte*  
BLOOMEN-  
THAL.

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of the company giving their acceptance for that sum, and giving him security on 10,000 fully paid-up preference shares of the company, and of Bloomenthal, in case of part of the loan being paid off, returning a proportionate part of the shares. On February 8, 1894, the secretary wrote to Bloomenthal as follows :—

“ We beg to acknowledge receipt of your cheque for 1000*l.*, in repayment of which we beg to hand you herewith our acceptance due August 11 for 1000*l.*, together with cheques in settlement of interest. We also hand you certificates for 10,000 7% Veuve Monnier Preference Shares, which we authorize you to hold as collateral security for the due payment of the above acceptance at maturity. It is understood that should we wish to pay off any part of this bill previous to the due date of same you are to return us shares at the same rate at which you have taken them.”

In the directors' minute-book, under the date of February 20, 1894, was the following entry :—

“ The secretary reported that under the managing director's authority an advance of 1000*l.* had been obtained from Mr. F. Bloomenthal against 10,000 of the company's 7% Cumulative Preference Shares deposited with him as collateral security for the due repayment of the company's acceptance at maturity. In completion of this advance bills were accepted and certificates signed by Mr. Austin and Mr. Hudson.”

Along with the letter of February 8 were ten certificates for 1000 shares each under the seal of the company in the following form :—

“ This is to certify that F. Bloomenthal of — is the registered proprietor of one thousand 7 per cent. Cumulative Preference Shares of 1*l.* each, numbered — to — both inclusive in Veuve Monnier et ses Fils, Limited, subject to the articles of association of the said company, and that on each of such shares the full amount has been paid.”

Bloomenthal afterwards, in his cross-examination, stated the proposal made to him as being “ That I should lend to the company 1000*l.* against 10,000 fully paid-up 1*l.* shares, with



this condition, that should the company at any time require any part of those shares I should be ready to transfer those shares at the same rate as what I had advanced."

In April, 1894, Bloomenthal made a further advance of 600*l.* under circumstances precisely similar to those of the sum of 1000*l.*

In November, 1894, the company disposed by public auction of 200 of the shares which had been registered in Bloomenthal's name at 17*s.* 6*d.* each, and he at the request of the company executed transfers of them, and signed an authority to the auctioneers to pay the purchase-money to the company. He received from them in reduction of the loan 20*l.* out of the purchase-money.

The shares which became vested in Bloomenthal were not in fact fully paid-up shares, but newly issued shares on which nothing had been paid.

In his cross-examination Bloomenthal stated that he considered the shares not to belong to him but to the company, and that he was "only custodian for the fulfilment of their acceptances." He further deposed that till December, 1894, he believed that the shares were fully paid up, and had never any suspicion to the contrary until he was casually informed by a stranger that they were shares on which nothing had been paid.

On receiving this information and finding that the company was not in a prosperous condition, Bloomenthal applied to the company to remove his name from the register, and in January, 1895, gave notice of motion to have his name expunged. Before this, however, a petition for winding-up was presented, on which an order for compulsory winding-up was subsequently made. He was placed on the list of contributories, and took out a summons in the winding-up to have his name expunged. Vaughan Williams J. refused the application, and Bloomenthal appealed.

*Astbury, Q.C.*, and *Romer*, for the appeal. We contend that to make a man liable as a member in the winding-up of a company he must have agreed to take shares of the nature

C. A.

1896

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In re

VEUVE

MONNIER

ET SES FILS,

LIMITED.

Ex parte

BLOOMEN-

THAL.

—

C. A.
1896
In re
VEUVE
MONNIER
ET SES FILS,
LIMITED.
Ex parte
BLOOMEN-
THAL.
—

of which the shares actually are, or he must have taken them with such knowledge as prevents him from raising an estoppel against the company arising from their certificate that the shares are not such as they really are. If the company itself had sought to put Bloomenthal on the register for shares not paid up, it would have been a gross fraud, and the Court is not bound to allow the liquidator to do what it would be a fraud in the company to do. In *Waterhouse v. Jamieson* (1) a transferee of shares was held to be protected by the statement of the company that they were fully paid up; and in the *Ooregum Gold Mining Company of India v. Roper* (2) it was intimated that if there was no knowledge the principle of *Waterhouse v. Jamieson* (1) would apply to an allottee as well as a transferee. It is there laid down that the rights which the liquidator enforces are in the right of the company, and he is in no better position than the company. An instance of this is *Beck's Case* (3), and this is a stronger case than that.

[LINDLEY L.J. Can the appellant say he is a bonâ fide holder for value without notice? Knowing as much as he did, could he be justified in believing that these shares were fully paid up?]

Constructive notice will not prevail against an estoppel. *Beck's Case* (3) is an instance of a struggle to let a person out of position not so hard as this. Bloomenthal cannot be considered to have contracted to take these shares. In *Carling's Case* (4) it was held that where the company stated shares to be fully paid up, it made no difference that they were allotted directly to the holder.

[RIGBY L.J. The Court in that case lays great stress on the fact that there was a registered contract, so that there might be fully paid-up shares on which money had not been paid.]

That was an important element; but the case went also on other grounds. The only question is whether a holder of shares took them with knowledge sufficient to prevent his relying on estoppel: *In re British Farmers' Pure Linseed Cake*

(1) L. R. 2 H. L., Sc. 29.

(2) [1892] A. C. 125.

(3) L. R. 9 Ch. 392.

(4) 1 Ch. D. 115.

Co. (1) ; *Burkinshaw v. Nicolls.* (2) The decision of the House of Lords is strongly in our favour. If a man has shares allotted to him as fully paid up in consideration of services he has rendered, he must see that there is a registered contract which authorizes it, otherwise he is hit by s. 25 ; but in other cases he is entitled to rely on the statement of the company that the shares are fully paid up, and the observations (3) precisely apply. In the case of *Ex parte Sandys* (4), the shareholder intended to take shares knowing that they had not been fully paid up, but believing that the directors had power to issue them at a discount. There was no mistake of fact in that case, but only a mistaken view of the law. In the *Ooregum Case* (5) there was full notice ; but the House of Lords recognised the principle of *Waterhouse v. Jamieson* (6) as the one which would have governed the case if there had been no knowledge. In *Parbury's Case* (7) Parbury, who was an original allottee, escaped, because in his certificate it was stated that 5*l.* per share had been paid, though in fact he had paid it to his own agent, who had embezzled it. Vaughan Williams J. here says that the appellant well knew that the shares had not in fact been paid up ; but the evidence does not support that view.

Eve, Q.C., and *Martelli*, for the liquidator. We concede that it was understood by all parties that the directors could legally make the shares security in this way ; but that was a mistake of law.

[LINDLEY L.J. Why should not Bloomenthal believe the statement of the directors that the shares were fully paid up ?]

We ask the Court to infer from the evidence that Bloomenthal was put on inquiry as to where 10,000 fully paid-up shares came from. He knew that they were not shares which had been allotted to some one else, for he regarded them all along as the property of the company ; he was put upon inquiry.

[RIGBY L.J. Is that enough to prevent an estoppel ?]

(1) 7 Ch. D. 533.

(2) 3 App. Cas. 1004 (S. C. on appeal).

(3) *Ibid.* 1016.

(4) 42 Ch. D. 98.

(5) [1892] A. C. 125.

(6) L. R. 2 H. L., Sc. 29.

(7) [1896] 1 Ch. 100.

C. A.

1896

In re

VEUVE

MONNIER
ET SES FILS,
LIMITED.

Ex parte
BLOOMENTHAL.

C. A.
1896
In re
VEUVE
MONNIER
ET SES FILS,
LIMITED.
Ex parte
BLOOMEN-
THAL.
—

It is enough to prevent estoppel that on the evidence it is impossible that Bloomenthal can have supposed that the shares had been paid up, and he does not say he did, nor does he suggest any way in which they could have been; he only supposed that he incurred no liability on them. He did not take any legal steps to repudiate them before the winding-up.

Astbury, Q.C., in reply. A positive statement creates an estoppel unless the person to whom it is made has sufficient knowledge to prevent his relying upon it. The liquidator only suggests constructive knowledge.

June 9. LINDLEY L.J. This is an appeal by Mr. Bloomenthal against an order of Vaughan Williams J. treating him as a shareholder in respect of 16,000*l.* preference shares in the Veuve Monnier et ses Fils, Limited. The company was registered in 1890. Mr. Bloomenthal obtained the privilege of doing their printing, and he occasionally lent them money. In February, 1894, he was asked to lend the company 1000*l.*, and he was induced to do so by the statement that he would have lodged with him as security 10,000 7 per cent. 1*l.* preference shares fully paid up. He did lend the company 1000*l.* upon the security of certificates for 10,000 preference shares. There was a similar transaction in April, 1894, when he lent the company 600*l.* upon the same terms as before and on the same security as before. The nature of the transaction is shewn by the secretary's letter of February 8, 1894 [his Lordship here read that letter], and Mr. Bloomenthal's account in his cross-examination is substantially to the same effect. He says: "The arrangement was this, that I should lend the company 1000*l.* against 10,000 fully paid-up 1*l.* shares with this condition, that should the company at any time require any part of those shares I should be ready to transfer those shares at the same rate as what I had advanced." Whether it was contemplated at the time that these shares should be registered in his name or not does not seem to be clear. I see no evidence to shew that it was part of the bargain that they should be registered in his name; but they were so registered, both the original 10,000 and the subsequent 6000, and he received certificates

from the secretary which are very important. I will read one of them. It is headed "Preference shares. Veuve Monnier et ses Fils, Limited, Registered, &c." "This is to certify that Mr. Bloomenthal is the registered proprietor of 10,000 7 per cent. cumulative preference shares of 1*l*. each numbered ——— to ——— both inclusive in Veuve Monnier et ses Fils, Limited, subject to the articles of association of the said company, and that on each of such shares the full amount has been paid." That informs Mr. Bloomenthal of two things. It informs him, first, that he has been registered in respect of those shares; it informs him, secondly, that on each of such shares the full amount has been paid. The first statement was true; the second statement was not true. Knowing that he had been so registered, he does not in any way object to it. When the 6000 shares are pledged to him as security for the further advance of 600*l*. he receives further certificates in the same form, again informing him that he is on the register in respect of those shares. It is very important with reference to one part of this case, that when the company in November required him to transfer some of those shares, to enable them to raise money and to repay him some of his advance, he executes transfers of those shares as a shareholder. Pausing there for a moment, that last fact satisfies me that this case cannot be brought within the principle of *Beck's Case* (1), on which Mr. Astbury so much relied. In *Beck's Case* (1) the man had been put on the register without any authority at all, and the only question, as James L.J. said, was whether there was anything to prevent him from denying that he was a shareholder. The answer was that there was absolutely nothing. But here there is. There is the assertion by him, or the exercise by him, of his rights as a registered shareholder, by transferring some of the shares which were put into his name and which were standing in his name with his knowledge and without any disapproval on his part. It appears to me, therefore, that it is impossible for him to say, as Beck said, "I am not a shareholder in this company." Such cases as *Ex parte Sandys* (2) and others are conclusive to my mind to shew that he is a

C. A.

1896

In re

VEUVE
MONNIER
ET SES FILS,
LIMITED.

Ex parte
BLOOMEN-
THAL.

Lindley L.J.

(1) L. R. 9 Ch. 392.

(2) 42 Ch. D. 98.

C. A.
1896
In re
VEUVE
MONNIER
ET SES FILS,
LIMITED.
Ex parte
BLOOMEN-
THAL.
Lindley L.J.

registered shareholder in respect of these shares, and he cannot get out of that position. Neither would he care to get out of it if the shares were what they were represented to be, namely, fully paid up.

I pass from the first step which I think is absolutely clear to the second step, which is the really important and difficult one—whether he can say to the company, “You are estopped from requiring me to pay upon these shares because of your statement, on the faith of which I acted, that on each of the shares put into my name the full amount had been paid.” Now if this gentleman were a *bonâ fide* purchaser for value of these shares without notice of the truth, I should be of opinion that he could say to the company, “You are estopped from denying that statement, and although I am a shareholder I am not liable to pay calls upon those shares because you have yourself admitted that they are fully paid up.”

That brings us to the question, which is the really difficult question in this case—the question of fact. That a *bonâ fide* holder for value of shares which purport to be paid up, and which he acquired without knowledge that they were not paid up, is not liable to calls, was settled in the Scotch case of *Waterhouse v. Jamieson* (1), and again in *Burkinshaw v. Nicolls* (2); and although those were cases of transfers, I am of opinion that the doctrine is not necessarily confined to transfers, but may be extended to the case of an allottee. *Parbury's Case* (3) is an instance in point. In that case Parbury was an allottee from the company. He had paid a person the full amount of those shares in order that that person might pay the same to the company and procure for Parbury a proper certificate. The person (Wright) who received the money and who was connected with the company misapplied the money; but the company gave Mr. Parbury a certificate that they had received his money and that his shares were paid up in full, although in truth that was not the case. The doctrine sanctioned by the House of Lords in *Waterhouse v.*

(1) L. R. 2 H. L., Sc. 29.

(2) 3 App. Cas. 1004.

(3) [1896] 1 Ch. 100.

Jamieson (1) and in *Burkinshaw v. Nicolls* (2) was properly applied in *Parbury's Case* (3), although he was an allottee and not a transferee. He had every reason to suppose that the statement made by the company to him was true, and he had no reason whatever to doubt that they had received his money, although in fact they had not.

Now, can Mr. Bloomenthal bring his case within that principle? Mr. Astbury has struggled very hard to satisfy us that he can. He says, "These certificates, which told my client, Mr. Bloomenthal, that he was the registered shareholder, told him in so many words that on each of such shares the full amount has been paid, and he had no suspicion that that was not true." That is the strongest way of putting it. But what did Mr. Bloomenthal know? It appears to me that he knew so much that if he had taken the trouble to avail himself of what he knew he would have realized the fact that these shares could not be fully paid up—in other words, he knew facts which shewed that that statement was not true, although I believe him perfectly when he said that he did not think about the matter, and that he did not see the consequences of what he was doing. Now, what he knew, unfortunately for him, was this: he knew, first of all, that these shares were the company's shares. It was part of the bargain that they should be the company's shares, and should be pledged to him by the company for the debt of the company, and that he should hold them for the company, subject, of course, to the repayment of his debt. He knew, secondly, that he had paid nothing upon them. Knowing those two things, he had all the facts necessary to shew anybody who put them together and thought about the matter at all, that the statement as to the shares being fully paid up could not have been true. It was suggested that, for anything he knew to the contrary, these shares might have been the property of some one who was entitled to have fully paid-up shares allotted to him, and that he was the nominee of some such person. It appears to me the nature of the transaction excludes the possibility of any such supposition;

(1) L. R. 2 H. L., Sc. 29.

(2) 3 App. Cas. 1004.

(3) [1896] 1 Ch. 100.

C. A.

1896

~~~~~

*In re*

VEUVE

MONNIER

ET SES FILS,  
LIMITED.*Ex parte*BLOOMEN-  
THAL.

Lindley L.J.

C. A.  
1896  
*In re*  
VEUVE  
MONNIER  
ET SES FILS,  
LIMITED.  
*Ex parte*  
BLOOMEN-  
THAL.  
Lindley L.J.

and I think, although at first I doubted it, that Vaughan Williams J. was right when he came to the conclusion he did, as a matter of fact, that "Mr. Bloomenthal did not think for one moment that the 10,000*l.* had been actually paid—that was not his notion; he knew perfectly well that the 10,000*l.* was not actually paid; he knew perfectly well that he was allottee of the shares." I believe that is true; but it must be qualified with this—though I am afraid the qualification cannot assist Mr. Bloomenthal—that he did not think it out. It is not that he did not know the truth, but it is that he did not realize the consequence, and he has unwarily fallen into a pit from which the ingenuity of his counsel, backed as it is by the desire of the Court, is not able to extricate him.

I think the appeal must be dismissed with costs.

LOPES L.J. In this case Mr. Bloomenthal is on the register for 16,000 shares, and he desires to be relieved from the liability attaching to his position as a registered shareholder.

Now, I do not hesitate to say that this is a very hard case, and, speaking for myself, I have struggled as far as I have been able to do so to exonerate him from the terrible liability which he has brought upon himself. There can be no doubt of this, that he is a registered shareholder; and I can have no doubt that he perfectly well knew that he was. But then what he relies on and what is urged by counsel on his behalf is this: he relies on estoppel. How far he can rely upon that in my judgment depends upon a question of fact, that question being what he really did know. If Mr. Bloomenthal did not know, and had no reason to know, that these shares were not fully paid up, the certificates to which reference has been made, which state in the clearest and most unequivocal language that the shares were fully paid up, would estop the liquidator and would prevent his setting up the truth; but if, on the other hand, he knew or ought to have known that those shares were not fully paid up, the estoppel would be unavailing. Now, I cannot doubt that he knew as a fact that these shares were not fully paid-up shares; he knew and must have known that he had not paid for them; he knew and must have known that



there had been no transfer to him of those shares; and he knew that the public to whom these shares had been offered had not taken them up. Moreover—and that I think is more important than anything else—he said he knew the shares belonged to the company. Now, how is that consistent with his believing the shares to have been fully paid up? I cannot come to any conclusion but that he knew, or had reason to know, or ought to have known, that they were not fully paid up.

In my judgment he knew as a fact that they were not fully paid up, but he did not know the effect of that knowledge on his liability.

On these grounds I think this appeal must be dismissed.

RIGBY L.J. I regret to feel myself constrained to agree with the judgment that has been already pronounced by the Lords Justices. I say so because I think this was a case in which none of the parties concerned for a moment thought that so serious a responsibility was being put on the appellant. But we have to deal with a code contained in Acts of Parliament, and though there are many advantages in a code there are some disadvantages. There are cases in which we might think it desirable to introduce modifications which we cannot find in the code itself; but if such cases occur our duty is simply to obey the directions given by the Legislature. Now, I assume without hesitation in favour of Mr. Astbury's client that he never understood or believed for a moment that he was incurring this liability, but he had the indiscretion to deal to a large amount in matters about which he knew very little—in matters in which his own opinion as to the legal effect of what he was doing was of no importance, and in which he ought to have known that it was of no importance; but the question is what he did, and not what was in his mind. Now, I assume in his favour that although he was an allottee and not a transferee he would be entitled to the benefit of the doctrine that a bonâ fide purchaser for value without notice (and I include a mortgagee under that description) is entitled to rely on a positive statement made to him by the company which he had not the means of knowing to be inaccurate. I assume also in his favour that the

C. A.

1896

In re

VEUVE  
MONNIER  
ET SES FILS,  
LIMITED.Ex parte  
BLOOMEN-  
THAL.  
—

C. A.  
1896  
~  
*In re*  
VEUVE  
MONNIER  
ET SES FILS,  
LIMITED.  
*Ex parte*  
BLOOMEN-  
THAL.  
—  
Rigby L.J.  
—

estoppel thus created is not defeated by his knowing circumstances sufficient to put him upon inquiry. This is not a question of constructive notice : the question is whether he had not before him direct and positive facts which ought to have been sufficient to bring any reasonable man to the conclusion that the statement made in the certificates that the shares were fully paid up was not made in the sense that cash had passed from any person to the company to the extent of 1*l.* per share, but that it was made only in the sense that the company were content to treat them, as I believe they did intend to treat them, as fully paid-up shares.

Now let us put together the facts (which unfortunately for this gentleman he was incapable of putting together, for the purpose of deriving a correct legal conclusion from them). He knew the position, for he had conversed with the secretary of the company on the question, and I cannot suppose that the conversation had passed from his mind at the time. He knew that the 40,000 preference shares, of which the 16,000 in question here formed part, had been offered to the public, and to a great extent offered in vain. He knew, therefore, that of that 40,000 a considerable sum remained with the company. They had not been issued, and therefore were not in a proper sense shares, but they formed part of the capital of the company capable of being issued, and he knew that they remained with the company in that sense. He bargained with the company in plain language that he would have a portion of that capital placed at his disposal as security for the payment of the promissory notes or bills of exchange which they gave for the moneys advanced, and that the company and the company alone, subject to his security, were to have the disposal of those shares, and were in fact the owners of those shares. He knew all that, and, as has been pointed out by Lindley L.J., there can be no doubt that he also knew, and knew as a matter of substantial knowledge, that he was the registered owner. He was told so by the very certificate upon which he relies as containing the statement which he seeks now to make an estoppel. But not only that. There were two stages of the transaction, and there was a third final dealing when he was

called upon to retransfer, and did retransfer in pursuance of his agreement to do so, some of these shares. He knew also that not a farthing of cash had passed from himself to the company in the way of payment of the capital that could be called up on those shares. He knew also—I say he knew, for he must have known it, and all the circumstances of the case pointed it out to him—that no one else had paid up the shares. The theory that some one else might by possibility have paid and so become the owners of the shares is met by the unfortunate fact that he knew there was no owner other than the company, and therefore no one who could have paid them. I say therefore, unhappily for him, he did know that the shares were not fully paid up in the only sense which could avail him—that is to say, that there was no person in existence who could have paid the company 1*l.* per share, or indeed any sum whatever per share so as to make them fully paid-up shares; and I can only reconcile (as I most willingly do) his evidence on the point by assuming (as the learned judge appears to have assumed) that when he said “I had not a suspicion that they were not fully paid up” he was speaking quite honestly. He had not a suspicion that they were not in law so fully paid up as to entitle him to be registered as the owner without any demand being made upon him. I do not think there is any sign at all that this gentleman tried to say anything that was not quite right. I fully accept that view. I think he is most unfortunately situated. It is a pity that a man should have undertaken so serious a matter as allowing himself to be registered (as undoubtedly he did) as the owner of 16,000 shares which he must have known were not certainly worth the full amount of 1*l.* per share, and that he should have undertaken to do that without seeking advice which would at once have told him “the very facts which you have put before us prove that these are not fully paid-up shares.” The facts which Mr. Astbury himself told us prove that he cannot rely upon an estoppel.

Solicitors for appellant: *Romer & Haslam.*

Solicitors for liquidator: *Gush, Phillips & Co.*

H. C. J.

C. A.  
1896  
~~~~~  
In re
VEUVE
MONNIER
ET SES FILS,
LIMITED.
Ex parte
BLOOMEN-
THAL.
~~~~~  
Rigby L.J.

C. A.

1896

June 24.

WHITWHAM *v.* WESTMINSTER BRYMBO COAL  
AND COKE COMPANY.

[1893 W. 1662.]

*Damages—Injury to Land—Trespass by tipping Spoil—Measure of Damages.*

The defendants having trespassed on the plaintiffs' land by tipping spoil thereon from their colliery:—

*Held* (affirming the decision of Chitty J.), that the amount of damages was not to be assessed by ascertaining merely the diminution in value of the plaintiffs' land, but that the principle of the way-leave cases (*Martin v. Porter*, 5 M. & W. 351; *Jegon v. Vivian*, L. R. 6 Ch. 742; and *Phillips v. Homfray*, L. R. 6 Ch. 770) applied: namely, that if one person without leave of another uses the other's land for his own purposes he ought to pay for such user; and that therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used by the wrongdoers ought to be taken into account; and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiffs by reason of the wrongful acts of the defendants.

THIS was an appeal by the defendants from a decision of Chitty J. (1)

The plaintiffs were the owners of 1A. 3R. 9P. of land near the defendants' colliery. The defendants since March, 1888, had tipped refuse from their colliery on this land, and had covered about 3R. 20P. to a great depth. At the trial it was declared that the land belonged to the plaintiffs, an injunction was granted to restrain the defendants from further tipping, and they were ordered to deliver up possession to the plaintiffs; and an inquiry was directed what, if any, sum of money was proper to be paid by the defendants to the plaintiffs by way of damages for injury sustained by the plaintiffs since March, 1888, by reason of the defendants' trespass by tipping or depositing spoil or other materials on the land.

The official referee by his report found that the defendants had rendered the plaintiffs' land valueless except for tipping purposes, and that the proper sum to be paid was 200*l.*, being the diminution in value of the land caused by the defendants' trespass since March, 1888. He stated that the plaintiffs con-

(1) [1896] 1 Ch. 894.



tended that the proper measure of damages was the reasonable value to the defendants in March, 1888, of the plaintiffs' land for tipping purposes, and claimed interest at 4l. per cent. per annum on such value from the respective dates at which the tipping was done. He found that if that was the proper measure the sum to be paid was 963l., and also 141l. 5s. for interest. Chitty J. held that the principle of the way-leave cases (*Martin v. Porter* (1), *Jegon v. Vivian* (2), and *Phillips v. Homfray* (3)) applied to so much of the land as had been used by the defendants for tipping, and as to this part they must pay on the footing of the value of the land to them for tipping purposes, but without interest; and that as to the rest of the land they ought to pay on the footing of the diminished value of the land to the plaintiffs.

It was arranged by counsel in Court that according to the principle of this judgment the defendants would have to pay 550l., and judgment was given for this sum with interest at 4l. per cent. from the date of the judgment.

The defendants appealed.

*C. A. Russell*, for the appeal. We contend that the proper measure of damages for a trespass on land is what the plaintiff has lost—the amount by which the land has been diminished in value by the trespass.

[*LOPES L.J.* I was always accustomed to charge a jury that in a case of trespass on land they must consider what the plaintiff has lost, not what the defendant has made out of it. Is there any authority against that?]

There is great dearth of authority: the cases are collected in *Mayne on Damages*, 5th ed. 430. In *Jones v. Gooday* (4) the defendant cut a ditch across the plaintiff's land, and it was decided that the diminution in value of the land was the standard—not the expense of restoring the land to its former condition. In *Hosking v. Phillips* (5), where a house on the plaintiff's land had been pulled down, the same measure

C. A.

1896

WHITWHAM  
v.  
WESTMINSTER  
BRYMBO COAL  
AND COKE  
COMPANY.

(1) 5 M. &amp; W. 351.

(2) L. R. 6 Ch. 742.

(3) L. R. 6 Ch. 770.

(4) 8 M. &amp; W. 146.

(5) 3 Ex. 168.

C. A.  
1896  
WHITWHAM  
v.  
WESTMINSTER  
BRYMBO COAL  
AND COKE  
COMPANY.  
—

of damages was taken. There is a class of cases on the question how the plaintiff is to be compensated where the defendant has trespassed by carrying coals by an underground way through the plaintiff's mine, and there the plaintiff got what according to the custom of the neighbourhood would have been paid for a way-leave: *Martin v. Porter* (1); *Jegon v. Vivian* (2); *Phillips v. Homfray*. (3) It is submitted, however, that these cases are of a special character, and do not lay down a general principle applicable to other cases. The Court was in this difficulty: a man had used his neighbour's way to his own profit, but he had not in any way diminished the value of the neighbour's property; so if the ordinary principle was applied the plaintiff would be entitled to no damages at all: the Court felt this to be unjust, and therefore resorted to the principle of the value of a way-leave. There is nothing in the present case to oblige the Court to depart from the ordinary rule. If A. has used B.'s land, and in doing so deprived B. of the profitable use of it, no doubt B. would be entitled to compensation for the loss of user; but here no loss of user is attempted to be shewn. The only loss sustained by the plaintiffs is the depreciation in the value of the land.

*F. Thompson*, for the plaintiffs. I submit that Chitty J. proceeded on the correct principle.

[LINDLEY L.J. Has the principle of the way-leave cases ever been applied except in way-leave cases? There is in them the difficulty pointed out by Mr. Russell.]

It may never have been actually so applied; but I contend that those cases proceed on the principle that a person who makes use of his neighbour's land without leave must pay for the user, and that is a principle generally applicable. Here, in addition to the user, there has been irreparable injury to the plaintiffs' land. *Jones v. Gooday* (4) and *Hosking v. Phillips* (5) were cases merely of destructive trespass; here, there has been destructive trespass, but also a user of the land which has been beneficial to the defendants.

(1) 5 M. & W. 351.

(2) L. R. 6 Ch. 742.

(3) L. R. 6 Ch. 770.

(4) 8 M. & W. 146.

(5) 3 Ex. 168.

[LOPES L.J. Can you take that into account?]

If you cannot, the way-leave cases were wrongly decided. In *Jegon v. Vivian* (1) Lord Hatherley says, "This Court never allows a man to make profit by a wrong"; and in *Phillips v. Homfray* (2) the principle on which the cases proceed is made clear. Suppose the defendants had carried spoil over the plaintiffs' land to tip it on the ground of another person beyond, surely the way-leave cases must apply, and the defendants must pay the plaintiffs on the footing of way-leave. They must also compensate the other owner for the tipping on his land. Now suppose both the pieces of land belong to the same person, why should the defendants pay less than if they belonged to two? The true distinction between the two classes of cases referred to is, that one relates to mere destruction, such as pulling down a house, which is of no benefit to the trespasser, and the other to trespass in which the trespasser derives a benefit from the use of the land.

*C. A. Russell*, in reply.

LINDLEY L.J. In this case we are all agreed that the principle acted upon by the learned judge is right. Let us consider what the defendants have done. They have done two things. They have, first of all, so used the plaintiffs' land as to diminish its value, say by 200*l*. Mr. Russell admits that the defendants must pay that, but contends that they are to pay no more. That leaves out of sight what more the defendants have done. What they have done more is this—they have been using the land for years. Why are not the plaintiffs to be entitled to some compensation in respect of that user? The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without leave of another been using that other's land for his

C. A.

1896

WHITWHAM

v.

WESTMINSTER  
BRYMBO COAL  
AND COKE  
COMPANY.

(1) L. R. 6 Ch. 742.

(2) L. R. 6 Ch. 770.

C. A.  
1896  
WHITWHAM  
v.  
WESTMINSTER  
BRYMBO COAL  
AND COKE  
COMPANY.  
Lindley L.J.

own purposes, he ought to pay for such user. The law is now settled by *Jegon v. Vivian* (1), which has been approved of by the House of Lords in *Livingstone v. Rawyards Coal Co.* (2) It proceeds upon the principle which Lord Hatherley L.C. stated in *Phillips v. Homfray*. (3) It must be borne in mind that if one man runs trucks on rails over another man's land it does not do any harm whatever, and there is no pecuniary damage. I will read what he says: "I at first felt some doubt as to compensation for way-leave; but on further consideration I think that on principle it ought to be given, whether the cases have as yet gone that length or not. Here is a man doing a surreptitious act which cannot be discovered except through the medium of a bill. Under the old practice there would have been a bill for discovery of the thing, and then an action for damages in respect of it would have been brought; but this Court has now the power to grant compensation in respect of a continuously accruing damage *de die in diem*, arising from a continuing trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through the respondents' property." Applying that reasoning to this case, on what principle of justice can it be said that these defendants are to use the plaintiffs' land for years for their own purposes, and to pay nothing for it, in addition to the injury that they have done to the land? Chitty J. has proceeded upon that principle, and, the principle being right, the figures are not disputed. The appeal must be dismissed with costs.

LOPES L.J. I, too, am of opinion that the decision of Chitty J. was right; and, in arriving at that conclusion, I do not think I am departing from that which has always been the rule, namely, that a plaintiff in an action of trespass for any injury to his land, is to be paid in respect of the loss he has sustained in consequence of the wrongful acts of the defendant, and any benefit which accrues to the defendant is not an element to be taken into consideration.

(1) L. R. 6 Ch. 742.

(2) 5 App. Cas. 25.

(3) L. R. 6 Ch. 770, 780.



Now, applying that principle here, what loss have the plaintiffs suffered in consequence of the wrongful act of the defendants? The value of their land, beyond all question, has been diminished; and Mr. Russell admits that the plaintiffs are entitled to be paid in respect of that. But there is something more in respect of which I think the plaintiffs are entitled to be compensated, and that is for the use the defendants have made of the plaintiffs' land during some eight years past. That, as I understand, is the principle that has been applied to this case by Chitty J., and I think that is a right principle. This is a peculiar case, and it may be said to be a mixed case—something between the ordinary trespass to land case and a way-leave case. I do not think that any authority can be said to have a strict bearing upon this case.

C. A.  
1896  
WHITWHAM  
v.  
WESTMINSTER  
BRYMBO COAL  
AND COKE  
COMPANY.  
Lopes L.J.

RIGBY L.J. I am of the same opinion. We have nothing to do with the figures, and we are only concerned with the principle of Chitty J.'s judgment, which I consider to be right. Independently of the permanent damage done, there has been a user of the plaintiffs' land by the defendants. We cannot take an account of the profits derived by the defendants from such user; and in fact it is a matter of indifference whether the defendants made a profit or loss out of the transaction. They did use the land for the purpose of carrying over it the spoil which they ultimately deposited at the foot of the tip on the plaintiffs' land. That appears to me to fall entirely within the principle of *Jegon v. Vivian* (1), and the other cases of that kind, *Martin v. Porter* (2) being, as far as I know, the first of them. There is nothing special in the nature of a way-leave, and there is nothing special for this purpose in an underground way. The principle is that a trespasser shall not be allowed to make use of another person's land without in some way compensating that other person for that user. Where the trespass consists in using a way over the plaintiff's land, a convenient way of assessing damages may be by an inquiry as to way-leave, which, when there is a customary rate of charge for way-leave in the locality, may furnish a convenient measure of damages; but the

(1) L. R. 6 Ch. 742.

(2) 5 M. & W. 351.

C. A. principle is that in some way or other, if you can do nothing  
 1896 better then by rule of thumb, the trespasser must be charged  
 ~~~~~ for the use of the land. In this case we are relieved from all  
 WHITWHAM difficulty about figures, because the learned counsel have agreed
 v. the amount; and all we have to say is that the principle enun-
 WESTMINSTER ciated by Chitty J. is right, with the consequence that 550*l.* is
 BRYMBO COAL the amount of the damage.
 AND COKE
 COMPANY.

Solicitors for appellants: *Norris, Allens & Chapman, for J. B. Pollitt, Manchester.*

Solicitors for respondents: *Field, Roscoe & Co., for Evan Morris & Co., Wrexham.*

H. C. J.

C. A. *In re* HIGGINSHAW MILLS AND SPINNING COMPANY.

1896

[1895 H. 8514.]

July 2.

Company — Winding-up — Liquidators — Possession — Mortgage — Interest — Distress — Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 87, 163.

Where the liquidators and receivers of a cotton-mill company in liquidation, and whose mill was in mortgage, took possession of the mill without any objection on the part of the mortgagee, and kept it in working order so as to prevent deterioration and to enable them to sell it as a going concern, the Court refused to give the mortgagee leave to distrain for interest accrued since the date of taking possession, holding that the possession of the liquidators and receivers was as much for the benefit of the mortgagee as of the company.

It is easier for a landlord to obtain leave to distrain for rent accrued after a winding-up order than for a mortgagee to obtain leave to distrain for interest.

In re Lancashire Cotton Spinning Co. (35 Ch. D. 656) and

In re Brown, Bayley and Dixon (18 Ch. D. 649), considered.

APPEAL from an order of the Vice-Chancellor of the County Palatine of Lancaster.

In July, 1873, the Higginshaw Mills and Spinning Company, Limited, was incorporated under the Companies Acts, 1862 to 1867, for the purpose of carrying on the business of cotton-spinning.

On October 24, 1873, the company mortgaged their mills for 40,000*l.* and interest at 5 per cent. per annum. The mortgage

contained the usual power of sale, and also a power (but without the usual attornment clause) for the mortgagees to distrain for interest in arrear "in such or the like manner as landlords are by law entitled to do in cases of distresses taken for non-payment of rent reserved on leases for years," without prejudice to any other remedy or right of the mortgagees.

In 1888 the company issued debentures to the amount of 30,000*l.*, charged upon all its undertaking and property. On October 4, 1895, the company presented a winding-up petition. On October 11, 1895, a debenture-holders' action was commenced in the Manchester District Registry; and on October 15 an order was made in that action for reference to the registrar to appoint a receiver. On October 24 the company passed an extraordinary resolution for a voluntary winding-up, and liquidators were appointed. On November 18 an order was made on the petition continuing the winding-up under supervision. On November 19 the liquidators—who were subsequently, on January 14, 1896, also appointed receivers under the order of October 15—took possession of the company's property, including the mills, there being then due to the mortgagees under their mortgage 25,000*l.* for principal and 8000*l.* for interest. The liquidators did not consult the mortgagees before taking possession, and no arrangement for the purpose was entered into between them; but it appeared that the mortgagees were aware of possession being taken, and made no objection thereto.

On December 16 the liquidators commenced running part of the mills for the purpose of working up and realizing the stock of cotton then on the premises, and continued to do so until January 14, 1896, when the stock was exhausted. After that date, and to prevent deterioration, the liquidators kept the premises in order and the machinery turning. Negotiations ensued between the liquidators and the mortgagees with the view to a sale; but these fell through in consequence of the mortgagees refusing to consent to receiving out of the purchase-money less than the amount of their debt.

On May 8, 1896, the mortgagees took out a summons in the winding-up and in the action for leave to distrain on the

C. A.

1896

In re

HIGGINSHAW
MILLS AND
SPINNING
COMPANY.

C. A.

1896

In re

HIGGINSHAW
MILLS AND
SPINNING
COMPANY.

mortgaged premises for 654*l.*, being the amount of interest accrued between November 19, 1895, the date on which the liquidators took possession, and the date of the summons; on June 2 the Vice-Chancellor, after hearing counsel for the applicants and the respondents, the liquidators, made an order that, notwithstanding the liquidation and the appointment of the liquidators as receivers, the applicants should be at liberty to distrain upon the chattels in and upon the mortgaged premises for the interest claimed, and to add their costs of the summons to their security.

By leave of the Vice-Chancellor the liquidators appealed.

The appeal was heard on July 2, 1896.

It was stated in the course of the argument that the assets of the company considerably exceeded the amount of the debenture debt.

Buckley, Q.C., and *Radford*, for the liquidators. Under s. 163 (1) of the Companies Act, 1862 (25 & 26 Vict. c. 89), any "distress" against the effects of a company in liquidation is absolutely void. But it has been held, in *In re Exhall Coal Mining Co.* (2), that this section must be read with s. 87 (1), under which the express enactment of s. 163 may be relaxed. In that case, by what has been since considered a somewhat forced construction, a distress was held by the Court of Appeal to be a "proceeding" within s. 87. However, that case, decided in 1864, has been always followed, though reluctantly, and therefore it must be now taken as settled that, under that section, the Court can control s. 163 and give leave to distrain for arrears of mortgage interest or rent. But it has been decided, in *In re Lancashire Cotton Spinning Co.* (3), that leave

(1) The Act contains the following enactments:—

Sect. 87: "When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

Sect. 163: "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents."

(2) 4 D. J. & S. 377.

(3) 35 Ch. D. 656.

will be given on two grounds only: first, if the Court considers it inequitable, under the circumstances, not to give leave to distrain—as, for instance, where a company is a lessee and goes into liquidation; in that case, if the liquidator elects to remain in possession, he must pay rent and the landlord may obtain leave to distrain—and secondly, if it can be shewn that what is proposed to be distrained for may properly be regarded as costs in the winding-up. With regard to the first ground, a mortgagee is in a different position from a lessee: per Cotton L.J. (1) As against his security a mortgagee can get his 20s. in the pound, or can prove in the winding-up; but he cannot distrain. Here the mortgagees had power to sell if they chose, and might thus have got immediately all that was due at the moment of taking possession both for principal and interest; but they elected not to do that; nor did they choose to take possession themselves. The result was that the liquidators took possession on behalf of all parties.

[LINDLEY L.J. Is this not a dispute between the prior mortgagees and the subsequent debenture-holders?]

The assets were larger than the debenture debt, and therefore the dispute is between the mortgagees and the shareholders only; so that the case does not fall within *In re New City Constitutional Club Co.* (2), where, there being no margin of assets, the contest was not between a mortgagee and the company, but between two mortgagees. Then, with regard to the second ground for granting leave, it must be shewn, as decided by *In re Lancashire Cotton Spinning Co.* (3), that the expenses incurred come under the head of costs in the winding-up; and to bring expenses incurred by the liquidator in holding possession under that head, the possession must be exclusively for the benefit of the company: if the possession is for the benefit of both the company and its mortgagees the expenses of possession are not costs in the winding-up. In the present instance the evidence shews that the liquidators' possession was just as much for the benefit of the mortgagees as of the

C. A.

1896

In re
HIGGINSHAW
MILLS AND
SPINNING
COMPANY.

(1) 35 Ch. D. 659.

(2) 34 Ch. D. 646.

(3) 35 Ch. D. 656.

C. A.

1896

In re

HIGGINSHAW
MILLS AND
SPINNING
COMPANY.

company. The learned Vice-Chancellor relied on *In re Brown, Bayley and Dixon* (1) as a ground for granting leave; but that case has really nothing to do with the present, for there the arrears of interest accrued before the winding-up, and what Fry J. said as to allowing a distress for interest accrued after the winding-up was a mere dictum. We submit that the case which governs the present is *In re Lancashire Cotton Spinning Co.* (2)

Astbury, Q.C., and *J. A. Tweedale*, for the mortgagees. The dictum of Fry J. in *In re Brown, Bayley and Dixon* (1) was, in effect, converted into an actual decision by the Court of Appeal in *In re Oak Pits Colliery Co.* (3), which case lays down the principle that if the liquidator takes possession of and uses the demised or mortgaged property of the company for the purposes of the winding-up, the landlord or mortgagee will be allowed to distrain, unless the liquidator has taken possession by arrangement with the landlord or mortgagee. The *Lancashire Cotton Case* (2) does not say that the liquidator may use the company's property without paying for it. If the company holds its property under a lease, the proposition that the liquidator may use that property beneficially without paying the landlord for it is unarguable; and there is no case which says that a mortgagee shall be deprived of his interest when the liquidator takes possession. The question is, To whom does the property really belong?

[LINDLEY L.J. In equity, I suppose to the mortgagor.]

The moment there is a winding-up the position of the mortgagor, that is, the company, is no doubt altered; but the mortgagee does not thereby lose his rights.

The *Lancashire Cotton Case* (2) does not say that a mortgagee cannot distrain for interest accrued since the winding-up, but only that he is not in quite so favourable a position as a landlord seeking leave to distrain. Here the liquidators took and retained possession, worked up the existing stock, and managed the business in the interests and for the benefit of the debentureholders, creditors, and shareholders only, and not for the benefit

(1) 18 Ch. D. 649.

(2) 35 Ch. D. 656.

(3) 21 Ch. D. 322, 330, 331.

of the mortgagees: the mortgagees should therefore be allowed to distrain for their interest accrued during the liquidators' possession. At all events they should have leave to distrain for interest between December 16, 1895, and January 14, 1896, the period during which the liquidators were working up and realizing the stock of cotton, for that was in no way for the benefit of the mortgagees.

C. A.
1896
~
In re
HIGGINSHAW
MILLS AND
SPINNING
COMPANY.
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LINDLEY L.J. In my opinion the learned Vice-Chancellor has made a mistake in granting leave to distrain in this case. The case is a simple one. [His Lordship stated the facts, and continued:—]

Up to November 19, 1895, when the receivers and liquidators took possession, the mortgagees had done nothing at all. They had not exercised their power of sale, and they had not distrained: they had done nothing. Now, what has happened is this. The receivers and liquidators have done what they could for the benefit of the mill. It was quite as much for the benefit of the mortgagees as of the shareholders and creditors that the mill should be kept up so as to be sold as a going concern. That makes an important difference between the case of a mortgagee and the case of a mere landlord. The liquidators carried on the mill as best they could, worked up the stock of cotton, and, after they exhausted it, kept the machinery going in order to prevent deterioration. Now the mortgagees apply for leave to distrain for interest accrued due since the date on which possession was taken. Upon what principle? They must have regard to the statutory enactments by which they are bound; and, as pointed out in *In re Lancashire Cotton Spinning Co.* (1), any one applying for leave to distrain must shew a reason why he should have it. Notwithstanding the absolute prohibition in s. 163, there may be circumstances which would justify the Court in granting leave. With regard to the construction that was placed upon the statute by the Court in *In re Exhall Coal Mining Co.* (2), I accept it; but persons seeking to distrain must shew why they should be allowed to do so, when the statute says they shall not. 'The

(1) 35 Ch. D. 656.

(2) 4 D. J. & S. 377.

C. A.

1896

*In re*HIGGINSHAW
MILLS AND
SPINNING
COMPANY.

Lindley L.J.

principles upon which leave to distrain is given to mortgagees are fully stated in the *Lancashire Cotton Case* (1), and the Court has explained the principles applicable to the case of a landlord applying for leave to distrain in *In re Oak Pits Colliery Co.* (2) The distinction between the two cases is all against the mortgagee—that is to say, it is easier for a landlord to shew why he should have leave than for a mortgagee to shew why he should have leave. The ground of the distinction is obvious. It would be unjust to say that a company holding under a lease might go on in the hope of carrying on its business and then tell the landlord that it would not pay his rent. As was said in the *Oak Pits Colliery Case* (3): “If the liquidator has retained possession for the purposes of the winding-up, or if he has used the property for carrying on the company’s business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up.” The reason for this is not so cogent in the case of a mortgagee. The mortgagee has the benefit of his security; and if the liquidator enhances the value of that security, that is as much for the benefit of the mortgagee as of the company. That, in my opinion, was the ratio decidendi in the *Lancashire Cotton Case* (1), where the Lords Justices decided that the mortgagee should not have leave to distrain for interest accrued since the winding-up. You must shew either some conduct on the part of the liquidator which makes it inequitable to enforce s. 163 against the mortgagee, or that the interest due to the mortgagee since the winding-up ought to be treated as part of the costs of the winding-up. This view is quite consistent with what Fry J. said in *In re Brown, Bayley and Dixon*. (4) There may be circumstances which make it just that mortgagees should have power to distrain for interest accrued since the winding-up.

In my opinion, this case is governed in principle by the *Lancashire Cotton Case* (1), and the Vice-Chancellor’s order must be discharged.

(1) 35 Ch. D. 656.

(2) 21 Ch. D. 322.

(3) 21 Ch. D. 330.

(4) 18 Ch. D. 649.

LOPES L.J. I agree. Sect. 163 is express, but it has been held that the section must be read with, and to a certain extent controlled, by s. 87. I cannot say how that conclusion was arrived at; but it was arrived at thirty-two years ago, and it has been acted on ever since. But it is clear from the *Lancashire Cotton Case* (1) that, in order to get rid of the fetter imposed by s. 163, you must establish special circumstances—special circumstances must be shewn. But the present case seems to amount to a question of fact, namely, whether circumstances have been shewn so as to make it inequitable that the mortgagees should not be allowed to distrain. I agree that the case is different from that of a landlord. The case of a mortgagee is weaker than the case of a landlord. If the liquidator has in the winding-up remained in possession and made a beneficial use of the landlord's property, I can quite understand that the rent which he ought to pay should be treated as part of the expenses of the winding-up. My opinion is that this case is governed by the decision in the *Lancashire Cotton Case* (1), and that the learned Vice-Chancellor has made a mistake in giving leave to distrain.

LINDLEY L.J. The order must be discharged and the summons dismissed with costs both here and below.

Solicitors: *Rowcliffes, Rawle & Co., for R. & J. Ascroft & Maw, Oldham; Woodcock, Ryland & Parker, for Tweedale, Sons & Lees, Oldham.*

(1) 35 Ch. D. 656.

G. I. F. C.

C. A.

1896

In re

HIGGINSHAW
MILLS AND
SPINNING
COMPANY.

C. A.

In re POLLARD'S SETTLEMENT.

1896

July 23.

Married Woman—Separate Estate—Restraint on Anticipation—Removal by the Court—Payment of Debts incurred through Extravagance—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.

The Court will not make an order under s. 39 of the Conveyancing Act 1881, in a case where it is sought to remove the restraint on anticipation merely for the purpose of raising money for the payment of debts incurred through the extravagance of the married woman or her husband.

The decision of Chitty J. ([1896] 1 Ch. 901) affirmed.

THIS was an appeal from a decision of Chitty J. (1), refusing an application by a married woman under s. 39 of the Conveyancing and Law of Property Act, 1881, for the removal of a restraint on anticipation contained in a settlement.

Farwell, Q.C., and *Johnston Edwards*, for the appellant, cited *In re Kershaw's Trusts* (2), *In re Long's Settlement* (3), *In re Wood* (4), and *Sedgwick v. Thomas*. (5)

[LOPES L.J. referred to *Hodges v. Hodges*. (6)]

Bartley Denniss, for the trustees, was not called upon.

LINDLEY L.J. We ought not to interfere in this case. Chitty J. has not said that "benefit" in this section must in all cases be confined to pecuniary benefit, and I do not intend to say so myself. I think that we are not disposed to fetter ourselves by saying anything of the kind. We feel, however, that if we were to do what we are asked to do, we should, as Chitty J. said, be allowing the hand of the Court to be forced. I cannot put it better than he did. He said this: "Recently, however, attempts have been made by married women, who have got into debt either through their own or their husband's extravagance, to endeavour to obtain in chambers orders for the removal of the restraint. If the judge were to yield to such applications, the result would easily be forecast by solicitors.

(1) [1896] 1 Ch. 901.

(2) L. R. 6 Eq. 322.

(3) 17 W. R. 218.

(4) 29 Sol. J. 183.

(5) 48 L. T. (N.S.) 100.

(6) 20 Ch. D. 749.

The married woman has only to involve herself in difficulties and to make piteous affidavits. If such a system got into vogue the married woman would be able to force the hand of the Court, and in effect destroy the restraint on anticipation." If we were to accede to this application, it would be a very bad precedent indeed, and we must refuse to interfere.

C. A.
1896

In re
POLLARD'S
SETTLEMENT.

LOPES L.J. I am entirely of the same opinion. It is unnecessary to say that "benefit" in the section means pecuniary benefit only; but I think that if we were to remove the fetter on anticipation in this case, we should be doing very serious mischief, and it would lead to those consequences which have been anticipated by Chitty J. I think his decision was right, and I agree with every word of his judgment.

RIGBY L.J. I am of the same opinion. The Legislature in the section has said that a married woman is not to be relieved from a restraint on anticipation unless it appears to the Court to be for her benefit that she should be relieved. We have no right to add the word "pecuniary" to the word "benefit" used in the Act of Parliament. It appears to me that on the facts of this case it would not be for this lady's benefit that she should be relieved from the restraint on anticipation. The appeal must be dismissed.

Solicitor: *Hood Barrs.*

W. W. K.

C. A.

RUDD v. JAMES.

1896

[1895 R. 988.]

June 12, 23.

Friendly Society—Branch composed of Minors—Governing Committee—Dissolution—Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), ss. 9, 13, 15, 25, 27—Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), ss. 6, 15, sub-s. 8; s. 15, sub-s. 8 (b); s. 25.

In 1873 a friendly society called the "Loyal Social Design Lodge" instituted a society to be called the juvenile branch of the lodge, and drew up rules for it which were registered and certified. The society was to consist of persons between the ages of six and eighteen. By rule 3, it was to be "governed" by a committee of eight appointed by the lodge. It was provided by rule 21 that no rules should be altered without the consent of a majority of members present at a special meeting. The members having been reduced to six persons about sixteen years of age, one of the members and the fathers of the rest on their behalf, without the consent of the committee, signed an instrument for dissolution of the society and distribution of its funds under the Friendly Societies Act, 1855, s. 13, and the Friendly Societies Act, 1875, s. 25, and the dissolution was advertised. The trustees in whom the property of the society was vested brought an action to set aside the instrument. Kekewich J. held that it must be set aside, on the ground that the fathers had no sufficient authority to sign on behalf of their children:—

Held, by the Court of Appeal, that as the Act of 1875 preserved the rules of old societies so far as they were not contrary to the Act, rule 3 was still in force; that it was to be considered a fundamental rule of the society from which the members could not escape; that the members could not dissolve the society without the consent of the committee; and that the instrument of dissolution must be set aside.

Whether, if the infant members had power by themselves to dissolve the society by signing an instrument of dissolution, an instrument signed for them by their fathers, guardians, or agents would suffice, *quære*.

THIS was an appeal by the defendants from a judgment of Kekewich J. setting aside an instrument of dissolution of a society called "The Juvenile Branch of the Loyal Social Design Lodge of Odd Fellows, Manchester Unity."

The Loyal Social Design Lodge was a friendly society formed in 1861, and in 1873 it created the juvenile branch under the powers of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), ss. 9, 25.

The following is a summary of the rules and regulations of the Juvenile Branch transmitted to and certified by the registrar:—

“1. That this society be called ‘The Juvenile Branch of the Loyal Social Design Lodge of Odd Fellows, Manchester Unity,’ and shall have for its object the relief of its members during sickness or accident and the interment of its members at death, and for supplying medical attendance and medicine.”

By rule 2, the society was to hold its meetings at a specified place on the first Wednesday in every month at 7.30 P.M. “In case of a removal being necessary, a motion for that purpose must be made and seconded by any member of the committee at one meeting night, and finally decided (by ballot if required) on the next.”

“3. That this society be governed by a committee of eight, to be elected annually together with the elective officers of the lodge; but in the event of a committeeman resigning or dying during the year, the committee shall have power to appoint another in his place until the next annual meeting.”

Rule 4 defined the duties of the secretary, and rule 5 defined the duties of the treasurer, and stated that he must be a member of the lodge, but said nothing as to his appointment. By rule 6, the committee were to appoint auditors. By rule 7, at the first meeting of the society three trustees were to be elected by a majority of the members there present.

By rule 8, persons between the ages of six and sixteen, producing the surgeon’s certificate of good health, were to be admitted members on payment of certain entrance fees; rules 9 and 10 provided for the contributions of members; rule 11 for the benefits they were to receive in sickness, which went on up to the age of eighteen; and rule 12, after providing for funeral allowances, went on to say that any member attaining the age of eighteen years should be allowed the entrance fee to admit him into the lodge, and also provided that, if a member attained the age of eighteen and failed to pass the doctor, he should be entitled to the benefits of the society for six months. By rule 13, the committee were to appoint a sick visitor at such remuneration as a majority of the committee might decide.

C. A.

1896

RUDD

v.
JAMES,

C. A.
1896
RUDD
v.
JAMES.
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By rule 14, a medical officer was to be appointed annually "by this society," his remuneration to be decided upon by the committee. By rule 17, any member who might have withdrawn from the society and wished to rejoin it might do so either by paying the whole of his arrears or as a new member, "according as a majority of the committee may decide." By rule 18, a member convicted of felony, or who should have committed any of the offences there mentioned, was to be expelled, and forfeit all claims on the society, "unless on an appeal to the committee they should direct otherwise."

"21. That no new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting specially called for that purpose."

By rule 22 it was provided that any member or officer of the committee misapplying the funds "shall repay the same, and be dealt with as a majority of the committee may decide."

On February 22, 1895, the number of members was six, and they were about the age of sixteen. On that day an instrument of dissolution was signed by one of the members, and by the fathers of the other five for their respective sons, disposing of the funds between the members equally. This instrument was registered at the office of the Chief Registrar of Friendly Societies, and the dissolution was advertised in the *London Gazette*, but no consent of the governing committee to the dissolution had been given. The trustees of the society brought the present action against the six members, and the fathers of five of them who had signed for their children, to set aside this instrument.

Kekewich J. set aside the instrument on the ground that the fathers who signed the instrument of dissolution had no power to do so on behalf of their children. The appeal was argued on May 18. and 19, 1896, the argument turning only on the grounds taken before the Court below, and judgment was reserved; but the Court of Appeal ordered the case to be put in the paper again, to have the point argued whether there was

any power to dissolve the society without the consent of the governing committee established by rule 3.

June 12. *Younger*, for the appellants. Sect. 13 of the Act of 1855 gives an absolute power to the members, by a certain majority, to dissolve a society formed under the Act; and s. 25 of the Act of 1875, which applies to all registered societies, new or old, repeats it. Neither of these sections renders the consent of any governing body requisite, nor do the Acts make any difference between the powers of infant members and adult members. Sect. 15 of the Act of 1855, which provides that minors may be members, if not disqualified by the rules, provides that no minor shall be competent to hold the office of director, trustee, treasurer, or manager, but does not otherwise limit the powers of minors; and the later Act, 38 & 39 Vict. c. 60, s. 15, sub-s. 8, leaves matters on the same footing. The Act of 1855, s. 13, requires no consent except that of persons having a pecuniary interest; and the case is the same under the Act of 1875, s. 25, sub-s. 7 (b). By rule 21, the members can alter the rules, and therefore can repeal rule 3.

Renshaw, Q.C., and *Lightwood*, for the plaintiffs. The Act of 1875, s. 15, sub-s. 8, says that a minor may, subject to the rules of the society, enjoy all the rights of a member; and by s. 6 the rules of the society, so far as they are not contrary to any provision of the Act, shall remain in force. That Act, therefore, leaves matters unchanged. Now, by the rules of this society it is to be "governed" by the committee of eight. This is a fundamental rule of the society, and a step of this importance cannot be taken without the concurrence of the committee.

Younger, in reply. The society could not by its regulations contract itself out of the power of dissolution which is given by statute: *Walker v. London Tramways Co.* (1); *Ellis v. Dadson*. (2) The word "governed" has no special force. Call this committee as you will, it was nothing but a committee of management.

Cur. adv. vult.

(1) 12 Ch. D. 705.

(2) W. N. (1891) 43.

C. A. June 23. The judgment of the Court (Lindley, Lopes and
1896 Rigby L.JJ.) was delivered by

RUDD
v.
JAMES.

LINDLEY L.J. This is an appeal from a judgment of Kekewich J. setting aside an instrument of dissolution of a friendly society called "The Juvenile Branch of the Loyal Social Design Lodge, No. 5006, Independent Order of Odd Fellows, Manchester Unity." The society consisted entirely of members between the ages of six and eighteen, and, being reduced in number to six members of about sixteen years of age, they, by their fathers and guardians, signed an instrument of dissolution dated February 22, 1895, with a view to divide the assets of the society among themselves. The main question is whether they have power to do this.

The first thing is to ascertain the powers conferred on the members at the time this society was formed. Having done this, the next step will be to ascertain to what extent (if any) these powers have been extended or restricted by what has occurred since the formation of the society.

The society was formed in 1873, under the provisions of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63). The society was formed for infants, but not by infants. It was formed by and as a branch of another society called "The Loyal Social Design Lodge," which had been in existence since 1861. The society was formed by this lodge under s. 9 of the Act of 1855. By s. 15 of that Act infants could be elected or admitted as members, and the Act did not limit the age below which infants could not be admitted. It is difficult, however, to suppose that the Legislature ever contemplated the formation of a society consisting only of children—at least, unless they were put under some governing body. Rules 8 and 15 of this society fixed six and eighteen respectively as the lowest and highest ages for membership. The society, therefore, was for the benefit of girls and boys between six and eighteen. It is obvious, however, that such persons could not manage their own affairs, and accordingly the lodge who created the society placed its government in the hands of a committee of eight persons appointed by themselves (rule 3). The power to do this is expressly conferred by s. 25 of the Act of 1855. That section expressly

empowered the lodge (being the persons intending to establish the society) to do the following things : (1.) To make rules for the regulation, government, and management of the society ; (2.) to appoint a general committee of management of the society ; (3.) to delegate to such committee all or any of the powers given by the Act to the members of the society. Rule 3 must be read by the light thrown upon it by this section, and bearing in mind that the society was for the benefit of children and young persons under eighteen. It must also be borne in mind that, although infants could be members of the society, they could not be directors, trustees, treasurers, or managers of it (s. 15 of the Act of 1855). Read by the light thus thrown upon it, the rule 3, which says "that this society be governed by a committee of eight" is, in our opinion, not a mere rule of management proceeding from the members, and which they need not observe longer than they like, but is a rule imposed upon the society by those who established it, and which the members by themselves cannot get rid of. Power to alter the rules is conferred by s. 27 of the Act of 1855, which, however, must be read with s. 25, and, as regards infants, with s. 15. These sections and the declaration to be made under s. 27 shew that this power of altering rules depends not only on s. 27 of the Act, but also on the rules themselves. Rule 21 says that no rule shall be made or altered without the consent of a majority of the members. This rule has not the effect of enabling the members to repeal rule 3, and so emancipate themselves from the government of the committee of management ; but it prevents the committee of management from altering the rules without the consent of the members, although the whole government of the society is entrusted to the committee. Rules 2, 6, 13, 14, 17, 18, and 22 further shew the extent to which the powers of the members are subject to those of the committee. This review of the Act and the rules forces us to the conclusion that rule 3 is the governing rule of this society, and that all the powers conferred by the Act of 1855 or by the rules upon the members must, whenever possible, be read as controlled by this rule. No other construction is consistent with the obvious intention of those who

C. A.

1896

RUDD
v.
JAMES.

C. A.
1896
~
RUDD
v.
JAMES.
—

made the rules and established the society. Persons over eighteen cannot be members of this society ; and to suppose that persons under that age could under this Act and rules throw over or get rid of the governing body, and govern the society themselves, is, in our view, ridiculous.

We have dealt at length on this point, because it throws great light on the power to dissolve. This power is not conferred by the rules, but by s. 13 of the Act of 1855. This section enables the members of a society governed by it to dissolve it ; but this again must be read with s. 25 and with the rules of the society, and so reading it, we cannot come to the conclusion that the members of this society can dissolve it without the consent of the committee to whom the government of the society is committed by rule 3. Such a construction is, in our judgment, wholly opposed to the scheme on which the society is based, and on the clearly expressed intentions of those who established it. In our opinion, therefore, it is clear that under the Act of 1855 the members of this society could not have dissolved it without the consent of the committee, and could not themselves have so altered the rules as to obtain power to dissolve the society without such consent.

We pass now to the effect of what has taken place since. The Act of 1855 has been repealed and been replaced by the Act of 1875 (38 & 39 Vict. c. 60) ; but the rules of existing societies are preserved so far as they are not contrary to any express provision of the Act (see s. 6), and the rules of this society, never having been altered, are as binding on its members as before, unless contrary to some express provision of the Act. Unless, therefore, rule 3, which places the members under the control of the committee, is contrary to some such provision, that rule is still a fundamental rule of the society, and one from which the members of the society cannot emancipate themselves. Under the Act of 1875, as under the Act of 1855, minors may be members (see s. 15, sub-s. 8), and although the age is raised to sixteen in new societies, the rule of this society which admits members as young as six is preserved (see s. 15, sub-s. 8 (b)). The Act of 1875 does not extend the power of the members of this society to alter the rules (see s. 13), nor does it, in our opinion, extend

the power to dissolve (see s. 25). Sect. 25 applies to all societies governed by the Act, whether old or new, and whether the members are over or under twenty-one; but as to old societies the section must be read with s. 6, which lets in their rules; and, for the reasons which we have given when examining the Act of 1855, we cannot arrive at the conclusion that the members of this society had power to dissolve the society without the consent of the committee in whom the government of the society is vested. The Act of 1875 has not altered the constitution of this society.

This view of the Act renders it unnecessary to consider whether, if the infant members had power to dissolve the society by themselves signing an instrument of dissolution, an instrument signed for them by their fathers, guardians, or agents would suffice. The point is not free from difficulty, and we say nothing about it.

It only remains to notice the objection that the trustees of the society are not entitled to maintain this action. The objection is founded upon the language of s. 25, sub-s. 6, of the Act of 1875, which only empowers certain persons to commence proceedings to set aside a dissolution. But the property of the society is vested in the plaintiffs, and, even if they are not interested in the property in the sense in which those words are used elsewhere in the Act, still there is nothing in the Act to prevent the trustees from taking whatever steps may be necessary to preserve that property from being disposed of contrary to the rules of the society. Indeed, power to do so is expressly conferred upon them by s. 21, sub-s. 1. The judgment appealed from is right, and the appeal must be dismissed, with costs.

Solicitors for appellants: *Sole, Turner & Knight, for Blake, Reed & Laphorn, Portsmouth.*

Solicitors for respondents: *Chamberlayne & Short, for Hyde & Hobbs, Portsmouth.*

H. C. J.

C. A.
1896
RUDD
v.
JAMES.

CHITTY J. *In re* THE EARL OF DEVON'S SETTLED ESTATES.

1896

July 15, 23.

[1886 D. 2189.]

WHITE v. EARL OF DEVON.

[1886 W. 2545.]

In re STEER.

STEER v. DOBELL.

[1894 S. 367.]

Statutes of Limitations—Settlement—General Power of Appointment—Appointment by Will—Appointees—"Reading in"—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 1, 2, 3, 20—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 2.

At and prior to Lady Day, 1876, a plot of land then forming part of the Devon settled estates was held by S. as tenant from year to year under an agreement dated in 1852. S. continued in possession down to his death in 1889, and after that date his representatives continued in possession. No rent was ever paid in respect of this plot of land after Lady Day, 1876.

Under a settlement dated in 1857 the Devon estates, including the reversion in the plot of land expectant on the tenancy of S., stood limited in the events which happened to the use of the eleventh Earl of Devon for life, remainder to the use of the twelfth Earl for life, remainder to such uses as the eleventh Earl should by deed or will appoint. This power was exercised by the eleventh Earl by his will, whereby he appointed the estates to H. and others as trustees. The eleventh Earl died in 1888, and on his death the twelfth Earl succeeded to the possession of the estates, and died in 1891 without having recovered the land in question. On the death of the twelfth Earl the remainder limited to H. and his co-trustees fell into possession, and the question was whether their estate was barred by the Statutes of Limitations:—

Held, that the case fell within the latter part of s. 2 of the Real Property Limitation Act, 1874, and that the twelfth Earl, being the person last entitled to a particular estate, and not being in possession or receipt of the profits of the land in question when his interest determined by his death in 1891, H. and his co-trustees had a further period of six years from that time to bring their action, and therefore that their estate was not barred.

In September, 1852, a plot of land forming part of the Devon settled estates was let to John Wotton Steer and Henry

Dobell on a yearly Michaelmas tenancy by verbal agreement at the annual rental of 3*l*.

The plot of land remained in the occupation of Steer and Dobell, and they paid the rent therefor up to the death of Dobell, after which it was paid by Steer up to Lady Day, 1876, and it remained in his possession down to his death in July, 1889; but after Lady Day, 1876, no rent was ever claimed by the owners of the Devon estates, and none was ever paid nor any acknowledgment given in respect thereof; and after the death of Steer the trustees of his will remained in possession or in the receipt of the rents and profits of the land without any such payment or acknowledgment.

The action of *Steer v. Dobell* was an action for the administration of the estate of John Wotton Steer, and an order for administration had been made therein.

The action of *White v. Earl of Devon* was a mortgagee's action, and had reference to the Devon estates, the title to which, so far as is material, was as follows:—

By a settlement dated July 22, 1857, and made between William Reginald, Lord Courtenay (afterwards eleventh Earl of Devon), and Edwin Baldwin Courtenay of the one part and trustees of the other part, and a deed-poll dated June 10, 1862, under the hands and seals of William Reginald, eleventh Earl of Devon, and Edwin Baldwin Courtenay, then Lord Courtenay, the Devon settled estates were limited to the use of William Reginald, eleventh Earl, for life, with remainder to the use of Lord Courtenay for life, with remainder to uses which failed in favour of the issue of Lord Courtenay, with remainder to such uses as William Reginald, eleventh Earl, should at any time by deed or will direct, limit, or appoint, with divers remainders over in default of appointment.

By his will dated September 17, 1885, William Reginald, eleventh Earl, devised, bequeathed, and appointed all his estate, including any over which he had or might acquire any power of appointment, to Lord Halifax and others as trustees, and died on November 18, 1888; and upon his death Lord Courtenay became twelfth Earl of Devon, and he died January 15, 1891.

By an indenture dated May 1, 1891, the Devon settled

CHITTY J.

1896

*In re*EARL OF
DEVON'S
SETTLED
ESTATES.

WHITE

*v.*EARL OF
DEVON.*In re*

STEER.

v.

DOBELL.

CHITTY J. estates were conveyed by the trustees of the will of the eleventh Earl to Henry Hugh, the thirteenth Earl; and by an indenture dated June 4, 1891, the same estates were settled to the use of the thirteenth Earl for life, with remainder to Henry Reginald, Lord Courtenay, for life, with divers remainders over in strict settlement.

1896
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*In re*  
 EARL OF  
 DEVON'S  
 SETTLED  
 ESTATES.

WHITE  
 v.  
 EARL OF  
 DEVON.  
 ———  
*In re*  
 STEER.  
 STEER  
 v.  
 DOBELL.  
 ———

The persons interested in the estate of John Wotton Steer, claiming to have acquired a possessory title to the plot of land inasmuch as they or their predecessors had been in possession thereof for more than twelve years without paying rent or acknowledgment of title, and the persons interested in the Devon settled estates contending that no such title had been acquired, having regard to the devolution of the title to the estates as before set out, the question whether the persons interested in the Devon settled estates could recover possession of the plot, and whether the persons entitled to the estate of John Wotton Steer had any and, if any, what title to or interest in the plot, was by consent submitted in the form of a special case for the decision of Chitty J., in whose Division the above actions were pending.

*Byrne, Q.C.*, and *Beaumont*, for the persons interested in the Devon estates. We submit that we are not barred by the Statutes of Limitations. The limitation contained in the will of the eleventh Earl to Lord Halifax and his co-trustees must be read into the settlement of 1857 which created the power, the estate limited taking effect from the time when the power was executed—that is, from the death of the eleventh Earl: *Farwell on Powers*, 2nd ed. p. 288; *Sugden on Powers*, 8th ed. p. 470; *Fearne*, 10th ed. vol. i. p. 74, s. v. 14.

The case falls within the latter part of s. 2 of the Act of 1874, which enacts that, if the person last entitled to any particular estate on which any future estate was expectant shall not have been in the possession or receipt of the profits of such land at the time when his interest determined, no action shall be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to bring such action shall have first

accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those periods shall be the longer. The twelfth Earl was the person last entitled to a particular estate, and he was not in possession or receipt of the profits when his interest determined in 1891. On his death the estate of the trustees of the will of the eleventh Earl became vested in possession; and they had, therefore, the further period of six years from his death within which they could bring their action.

*G. Cave*, for the plaintiffs in the second action, being the persons interested in estate of J. W. Steer. The claimants are barred by s. 1 of the Real Property Limitation Act, 1874. By s. 1 of the Act of 1833 (which under s. 9 of the Act of 1874 is to be read into the latter Act) persons claiming as appointees under another person are to be considered as claiming through him. The present claimants, therefore, claim through the eleventh Earl, whose right of action accrued at Lady Day, 1876, and are accordingly barred under s. 1, the eleventh Earl having died in November, 1888.

Sect. 3 of the Act of 1833, and s. 2 of the Act of 1874, cannot be used to cut down s. 1 of the latter Act: *James v. Salter* (1); *Governors of Magdalen Hospital v. Knotts*. (2) The argument founded on those sections is inapplicable unless the words "in respect of the estate or interest claimed" are inserted in s. 1 after the word "accrued." A general power of appointment is equivalent to absolute ownership: Farwell on Powers, 2nd ed. p. 286; *Rous v. Jackson*. (3) The power was also barred before the death of the eleventh Earl as being an "other estate, interest, right, or possibility" within the meaning of s. 20 of the Act of 1833, or was extinguished as a "right or title" under s. 34 of the same Act: *Doe v. Mouldsdale*. (4)

There are exceptions to the doctrine that the appointee takes under the original deed. Where the power is a general power the rule against perpetuities is applied, and the doctrine of

CHITTY J.

1896  

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In re  
EARL OF  
DEVON'S  
SETTLED  
ESTATES.  

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WHITE  
v.  
EARL OF  
DEVON.  

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In re  
STEER.  
STEER  
v.  
DOBELL.  

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(1) 3 Bing. N. C. 544.  
(2) 8 Ch. D. 709, 727.

(3) 29 Ch. D. 521, 526.  
(4) 16 M. & W. 689.

CHITTY J. equity that the estate created under a general power of appointment is assets for the payment of the appointor's debt is also an exception to the general rule.

1896

*In re*

EARL OF  
DEVON'S  
SETTLED  
ESTATES.

WHITE  
*v.*

EARL OF  
DEVON.

*In re*  
STEER.

STEER  
*v.*

DOBELL.

*Byrne, Q.C.*, in reply. The supposed exceptions to the doctrine of "reading in" are not true exceptions, as the rule as to perpetuities turned on the "reading in" taking place when the appointment was made, and the rule as to debts arose from treating the appointees as trustees for creditors.

The term "appointee" in the definition clause in the Act of 1833 does not include such a case as the present: it is meant to cover the case of a person claiming under an appointment the estate of the appointee—that is, an estate which once belonged to the appointor, or part of that estate: for example, appointees under a power in a settlement created by the owner after he was himself barred.

This case clearly comes within s. 2 of the Act of 1874. Lord Halifax and his co-trustees are entitled on reversion or remainder within that section because of the life interest of the twelfth Earl.

Sect. 20 of the Act of 1833 does not apply to the case of a power.

*Cur. adv. vult.*

July 23. CHITTY J. The controversy arises between the persons interested in the Devon settled estates on the one hand, and the persons entitled to the real estate of J. W. Steer on the other. The parties have agreed to a special case, and the question submitted is whether the persons interested in the Devon estates can recover a piece of land which is in the possession of the persons representing Steer.

Under the uses of the settlement made in 1857 of the Devon estates the eleventh Earl was entitled as tenant for life to the reversion expectant on the tenancy from year to year under which the land was held prior to 1876. Regard being had to the 8th section of the Statute of Limitations of 1833 and to the statute of 1874, and to the non-payment of rent by the yearly tenant, it is admitted that the right of the eleventh Earl to recover the land was barred a few months before his death,



which occurred in November, 1888. The adverse possession of Steer began in 1876; he continued in possession down to his death in 1889; since then his representatives have continued in possession. There has been no payment of rent or acknowledgment to take the case out of the statutes.

Under the same settlement of 1857 the Devon estates stood limited, in the events which happened, to the use of the eleventh Earl for life, as already mentioned, remainder to the use of the twelfth Earl for life, remainder to such uses as the eleventh Earl should by deed or will appoint. This power was exercised by the eleventh Earl by his will, whereby he appointed the Devon estates to Lord Halifax and others. On the death of the eleventh Earl the twelfth Earl succeeded to the possession of the Devon estates, and died in 1891 without having recovered the land in question. On the death of the twelfth Earl the remainder appointed to Lord Halifax and others fell into possession. The question is whether their estate is barred by the Statutes of Limitations. That estate was a future estate when the statutes had run against the life estate of the eleventh Earl.

The case of future estates appears now to depend upon the 2nd section of the Act of 1874, construed with the 4th branch of the 3rd section of the Act of 1833, and on the 20th section of the same Act. The statement to this effect in the 9th edition of Shelford, by Carson, p. 195, appears to me to be correct.

A point of general law was raised in reference to the execution of the power by the eleventh Earl. According to the established doctrine, the limitation to Lord Halifax and others must be read into the settlement which created the power, the estate limited taking effect from the time when the power was executed—in this case from the death of the eleventh Earl: see Lord St. Leonards on Powers, 8th ed. p. 470 et seq. The doctrine that the appointee takes under the original deed is followed in all its consequences, except that where the power is a general power the rule against perpetuities is applied only from the time of executing the power: *Rous v. Jackson*. (1)

CHITTY J.

1896

*In re*  
EARL OF  
DEVON'S  
SETTLED  
ESTATES.

WHITE  
*v.*  
EARL OF  
DEVON.

*In re*  
STEER.

STEER  
*v.*  
DOBELL.

CHITTY J. That exception has no bearing on the present case. The doctrine of equity that the estate created under a general power is assets for the payment of the appointor's debts is not a true exception to the general doctrine. The appointee of real estate is treated as a trustee for the creditors of the appointor: *Fleming v. Buchanan*. (1)

1896  
 In re  
 EARL OF  
 DEVON'S  
 SETTLED  
 ESTATES.

WHITE  
 v.  
 EARL OF  
 DEVON.

In re  
 STEER.  
 STEER  
 v.  
 DOBELL.

For Steer's representatives it was argued that the case fell within the 20th section of the Act of 1833. The general effect of that section is that when the right to an estate in possession is barred the right of the same person to future estates is also barred. The argument was that inasmuch as the estate of the eleventh Earl as tenant for life was barred the estate limited by him in virtue of his power to Lord Halifax and others was also barred. It was said that a general power of appointment fell within the words "other estate, interest, right, or possibility," and particularly that such a power was included in the word "right." This argument is unsound. The Act deals with our highly technical system of real property law, and the language employed is necessarily technical.

It has to be borne in mind that real actions were in existence when the Act of 1833 was passed, and were abolished by s. 36 of that Act. No real property lawyer in 1833 would have spoken of a power of appointing uses as an "estate, interest, right, or possibility." The terms "right" and "possibility" are used in their technical sense. "Right," for instance, applies to the case of an estate turned to a right which could be enforced only in a real action. I hold that a power is not within the section.

For Steer's representatives it was also argued that the case falls within the 1st section of the Act of 1874, read in connection with the 1st or interpreting section of the Act of 1833. On the other hand, it was contended for the Devon estates that the case was governed by the 2nd section of the Act of 1874. The relation of these two sections is explained by the decision of the Court of Common Pleas on the relation of the analogous sections, the 2nd and 3rd of the Act of 1833, in *James v. Salter* (2), approved by the House of Lords in the

(1) 3 D. M. & G. 976.

(2) 3 Bing. N. C. 544, 553.

*Irish Land Commission v. Grant.* (1) Tindal C.J. in giving judgment said: "That the case must have been governed by the 2nd section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the 3rd section, the object and intent of it seem to us, to be no more than this: to explain and give a construction to the enactment contained in the 2nd clause as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the 2nd section, but is not included amongst the instances given by the 3rd, to be governed by the operation of the 2nd."

In the *Governors of Magdalen Hospital v. Knotts* (2), the Court of Appeal, citing *James v. Salter* (3), used somewhat different language, but did not intend in any way to modify the clear expressions found in the judgment of Tindal C.J.

I proceed to consider the 1st and 2nd sections of the Act of 1874: in stating the relevant portions of the sections I shall, for the sake of clearness, omit words not bearing on the present question. The 1st section enacts that no person shall bring an action to recover land but within twelve years next after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to bring such action shall have first accrued to the person bringing the same. For Steer's representatives it was argued that the right to bring an action first accrued to the eleventh Earl, and that Lord Halifax and others as appointees claim through him, and are therefore barred by the section. Reference was made to the 1st section of the Act of 1833, which interprets the meaning of the expression, claiming through another person. The enactment is that the words and expressions thereafter mentioned, which in their ordinary signification have a more confined or different meaning, shall in the Act,

CHITTY J.

1896

*In re*  
EARL OF  
DEVON'S  
SETTLED  
ESTATES.

WHITE  
*v.*  
EARL OF  
DEVON.

*In re*  
STEER.

STEER  
*v.*  
DOBELL.

(1) 10 App. Cas. 14, 27.

(2) 8 Ch. D. 709.

(3) 3 Bing. N. C. 544.

CHITTY J. except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows:

1896  
*In re*  
 EARL OF  
 DEVON'S  
 SETTLED  
 ESTATES.  
 —  
 WHITE  
*v.*  
 EARL OF  
 DEVON.  
 —  
*In re*  
 STEER.  
 STEER  
*v.*  
 DOBELL.  
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“The person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise.” The term “appointee” was fastened upon; and it was argued that Lord Halifax and others, being appointees of the eleventh Earl, claimed through him within the interpretation clause of the Act of 1833, which, by virtue of the 9th section of the Act of 1874, is to be read with that Act. No doubt there is a difficulty in ascertaining the meaning of the term “appointee.” Limitations to dower uses were in vogue when the Act of 1833 was passed; and it seems to me that, regard being had to the context in the interpretation clause itself, an appointee under the general power of appointment contained in such limitations would be within the meaning. But I think that appointees under a special power would not. Suppose, for instance, under a settlement lands were limited to the use of one for life, remainder to such uses in favour of one or more of his children as he should appoint, and in default to the use of his children in fee: it would, I think, be absurd to say that the right of the children to recover depended on the exercise or non-exercise of the power—that if the power were exercised they were barred if the estate of the appointor were barred, but they were not barred if the power were not exercised. In fact, the children would not claim by, through, or under, or by the act of the appointor. They would claim under the settlor, and by the combined operation of the acts of the settlor and the appointor. Obviously some restriction as to the meaning of the term “appointee” is imposed by the interpretation clause itself. But for the reasons presently stated, it is not necessary for me to decide whether the term “appointee” includes the case where the power of appointment is not in substance created by the appointor himself: a question which I leave open.



In my opinion, consistently with the judgment in *James v. CHITTY J. Salter* (1), the case falls within the 2nd section of the Act of 1874. That section deals specially with cases in which a doubt or difficulty might occur as to the time when the right to bring an action accrues. The section enacts that a right to bring an action to recover land shall be deemed to have first accrued in respect of an estate in remainder or other future estate at the time at which the same shall have become an estate in possession by the determination of any estate or estates in respect of which such land shall have been held or the rents and profits thereof shall have been received notwithstanding the person claiming such land or some person through whom he claims shall at any time previously to the creation of the estate or estates which have been determined have been in possession or receipt of the profits of such land: but if the person last entitled to any particular estate on which any future estate was expectant shall not have been in the possession or receipt of the profits of such land at the time when his interest was determined no such action shall be brought by any person becoming entitled in possession to a future estate but within twelve years next after the time when the right to bring such action shall have first accrued to the person whose interest shall have so determined or within six years next after the time when the estate of the person becoming entitled in possession shall have vested in possession whichever of those periods shall be the longer. The case falls within that part of the section which begins with the word "but." The person last entitled to a particular estate was the twelfth Earl; he was not in possession or receipt of the profits when his interest determined; and Lord Halifax and others had the further period of six years (which has not yet elapsed) after his death to bring their action; and therefore I hold that their estate was not barred.

Solicitors: *Lake & Lake; Ford, Lloyd, Bartlett & Michelmore, for Hacker & Michelmore, Newton Abbot.*

(1) 3 Bing. N. C. 553.

G. M.

1896  
*In re*  
 EARL OF  
 DEVON'S  
 SETTLED  
 ESTATES.  
 ———  
 WHITE  
*v.*  
 EARL OF  
 DEVON.  
 ———  
*In re*  
 STEER.  
 ———  
 STEER  
*v.*  
 DOBELL.  
 ———

CHITTY J.

ERNEST v. LOMA GOLD MINES, LIMITED.

1896

[1896 E. 675.]

July 17, 24.

*Company—Meeting of Shareholders—Special Resolution—Show of Hands—Proxies—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51—Blanks in Proxy—Validity—Authority to fill up—Duly Stamped—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 80.*

At a meeting of the shareholders of a company convened for the purpose of passing a special resolution, though the regulations of the company provide that votes may be given personally or by proxy, a member present only by proxy has no right to vote upon a show of hands.

*In re Caloric Engine and Siren Fog Signals Co.* (52 L. T. (N.S.) 846) discussed and followed.

*In re Bidwell Brothers* ([1893] 1 Ch. 603) disapproved.

A notice convening an extraordinary general meeting to confirm a special resolution was accompanied by a circular from the secretary and directors with a proxy attached asking for the return of the proxy in support of the resolution; by a printer's error the date of the meeting was left blank in the proxy. The secretary filled up this blank in several of the proxies after they had been executed and returned by the members:—

*Held*, that, as the members by returning the proxies in compliance with the circular must have intended that they should be used at this particular meeting, the secretary had authority to fill in the date, and that these proxies were valid and duly stamped within the provisions of the Stamp Act, 1891, s. 80.

MOTION on behalf of the plaintiff and all other shareholders in the defendant company, against the company, its chairman and liquidator, for an interim injunction to restrain the defendants from acting upon, or in any way carrying out, a special resolution purporting to be passed by the defendant company on June 3, 1896, and to be confirmed on July 1, 1896, for the voluntary winding-up of the defendant company and the appointment of the defendant as liquidator.

The special resolution was impeached on two grounds—first, that at the meeting in June the chairman, on a show of hands, refused to count the votes of those present by proxy; and, secondly, that at the meeting in July, when a poll was taken, the chairman had improperly allowed certain proxies, in which the date and hour of the meeting had been filled in by some

one other than the person giving such proxy after the same had been lodged with the company. CHITTY J.

The defendant company was incorporated in June, 1890, under the Companies Acts, 1862 to 1890, with a capital of 300,000*l.*, divided into 300,000 shares of 1*l.* each, of which all but a few had been issued.

1896  
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 ERNEST
 v.
 J.OMA GOLD
 MINES,
 LIMITED.
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The articles of association, so far as material to this report, after excluding the regulations contained in Table A in the first schedule to the Companies Act, 1862, were as follows:—

“56. No business other than the declaration of a dividend shall be transacted at any general meeting unless a quorum of members shall be present at the time when the meeting proceeds to business. And it is hereby declared that five shareholders, each of whom must be present in person or by proxy, shall be required to constitute a quorum.”

“60. At any general meeting every motion made and submitted shall be decided in the first instance by a majority in number of the members to be ascertained by a show of hands; and unless a poll is demanded by at least three members holding at least one-tenth of the shares of the company, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact without any proof of the number or proportion of the votes recorded in favour of or against such resolution.”

“61. If a poll is demanded as aforesaid it shall be taken in such manner and form as the chairman shall direct, and he shall have power to adjourn the meeting for a reasonable time for the purpose of taking such poll,” and “the result of such poll shall be deemed to be the resolution of the meeting at which the poll was demanded, and shall be binding on the company. In case of an equality of votes (either on a show of hands or on a poll) at any general meeting, the chairman shall be entitled to a second or casting vote.”

“62. Every member shall have one vote for every share which he shall hold in the company.”

“66. Votes may be given either personally or by proxy. The instrument appointing a proxy shall be in writing in the

CHITTY J. common form, and under the hand of the appointor, or if such appointor be a corporation under their common seal.”

1896
ERNEST
v.
LOMA GOLD
MINES,
LIMITED.
—

67 provided that proxies must be members of the company entitled to vote, and that all instruments appointing a proxy should be deposited at the company's office not less than forty-eight hours before the time of the meeting.

The plaintiff was the registered holder of 2000 fully paid-up shares.

In pursuance of a notice duly given to the shareholders, an extraordinary general meeting of the company was held on June 3, 1896, for the purpose of considering, and, if thought fit, passing, a resolution for the reconstruction of the company by means of a voluntary liquidation and the appointment of a liquidator.

Prior to this meeting the plaintiff obtained proxies from 431 shareholders, representing 102,000 shares, which were duly lodged with the secretary in accordance with art. 67.

The plaintiff attended the meeting of June 3, and upon the chairman putting the resolution to the meeting, twelve shareholders voted, by a show of hands, for the resolution, and the plaintiff and one other shareholder against it. The plaintiff alleged that he told the chairman that he claimed by shewing his hand to vote for himself and all the shareholders whose proxies he had lodged as aforesaid; but on this point there was a conflict of evidence, though it was admitted that the chairman declared the resolution carried. The plaintiff then demanded a poll on behalf of himself and all other shareholders whose proxies he held; but the chairman refused to accede to this demand on the ground that the plaintiff was not supported by a sufficient number of members present in person either according to art. 60 or in accordance with s. 51 of the Companies Act, 1862.

The plaintiff alleged that if the votes he claimed had been allowed and counted by the chairman the resolution would have been lost.

Notice of the intention to hold a confirmatory meeting on July 1 at one o'clock setting forth the special resolution was duly sent to all the members of the company. Accompanying

this notice was a circular signed by the secretary and emanating from the chairman and other directors with a form of proxy to be returned, and giving reasons why the proxies should be sent as requested by the directors. The proxy enclosed was in the usual and regular form except that it omitted to state the day and hour of the meeting. The secretary having discovered this omission on the return of some of the proxies, sent a post-card to the members stating, that by a printer's error the date and the time of meeting had not been inserted in the proxy form, and continued, "Kindly insert the same. If you have already sent me the form in blank, I shall assume that I have your authority to fill in the date." The secretary filled in the blanks in several of the proxies, and filled them in in time for the proper lodgment of the proxies according to art. 67.

The plaintiff attended the meeting on July 1, when the resolution was put to the meeting and declared by the chairman to be carried; thereupon a poll was demanded by five shareholders, and the plaintiff and the auditor of the company were appointed scrutineers. At the close of the poll it was found that there was a majority of 16,704 votes in favour of confirming the resolution. On scrutinising the proxies the plaintiff objected to 19,846 votes given in favour of the resolution, on the ground that the date of the meeting had in his opinion been filled in by a person other than the person giving such proxy after the proxy had been lodged; and he also objected to proxies representing 5590 votes in favour of the resolution, on the ground that the hour of the said meeting had either been omitted altogether, or had been filled in by some person other than the person giving such proxy after the same had been lodged.

The chairman, however, overruled all these objections, and declared the result of the poll to be a majority of 16,704 in favour of confirming the resolution.

On July 3 the plaintiff commenced this action, and now applied for an interim injunction in the terms already stated.

Ashton Cross, for the plaintiff. By the regulations of this company voting by proxy is allowed, and more weight is given to proxies than is usual, for art. 56 provides that the quorum

CHITTY J.

1896

ERNEST

v.

LOMA GOLD
MINES,
LIMITED.

CHITTY J. for a general meeting is to consist of five members "present in person or by proxy"; it was, therefore, the duty of the chairman on the show of hands to count the vote of each person who had appointed a proxy, not according to the number of the shares held by him, but as one vote: *In re Bidwell Brothers*. (1) Unless the counting of proxies is allowed on a show of hands, no effect is given to the wishes of members present by proxy. *In re Caloric Engine and Siren Fog Signals Co*. (2) is opposed to my present contention; but that case was discussed in *In re Bidwell Brothers* (1) and not followed. The chairman knows perfectly well the number of proxies that have been given for a particular meeting, because they are all lodged forty-eight hours before the time of meeting, and there is no difficulty in ascertaining the number of members present by proxy. On the wording of s. 51 of the Companies Act, 1862, the votes of those present by proxy ought to have been counted; proxies are allowed in this company, and a special resolution, therefore, cannot be passed unless three-fourths of the numbers present, personally or by proxy, are in favour of it. Had the members present by proxy been counted, as they ought to have been, the resolution would in fact have been lost.

Even if the chairman's ruling as to the result of the first meeting is conclusive, then I say the resolution was not confirmed at the second meeting in July, when a poll was taken, because proxies amounting to 19,846 votes in favour of the resolution were invalid, not being duly stamped in accordance with s. 80 of the Stamp Act, 1891. That section provides that every proxy paper charged with a penny duty is to "specify the day upon which the meeting at which it is intended to be used is to be held." These proxies were executed and returned with the date left blank. This defect could not be cured by the secretary.

E. W. Stock, for the defendants. *In re Caloric Engine and Siren Fog Signals Co*. (2) is precisely in point, and gives the correct statement of the law. True, it is directly opposed to *In re Bidwell Brothers* (1); but that decision is wrong. It creates a new hybrid class of voter, half personal, half proxy,

(1) [1893] 1 Ch. 603.

(2) 52 L. T. (N.S.) 846.

and sets up a practice which is unworkable: Palmer's Company Precedents, 6th ed. vol. i. pp. 338 and 525. The system thus attempted to be introduced is unknown to the common law: *In re Horbury Bridge Coal, Iron, and Waggon Co.* (1) There is nothing in the wording of s. 51 of the Companies Act, 1862, which points out that any other mode is to be adopted but the usual common law one on a show of hands.

[He was stopped on this point.]

As to the objection to the proxies on the ground that the date was in blank and that it was subsequently filled up, I say it cannot be sustained: the proxy not being a deed, the date might be filled in after signature by a person having authority to do so. The secretary in this case had authority to supply the date of the meeting of which notice had been duly given, and for which alone this proxy had been prepared. Under these circumstances the proxies were duly stamped and could be used. *Ex parte Lancaster* (2) is an analogous case and is in my favour.

Ashton Cross replied on the second point.

[During the hearing, a print of the articles in *Caloric Engine and Siren Fog Signals Co.* (3) was obtained and handed to the judge. The articles provided that "votes may be given personally or by proxy."]

CHITTY J. At a general meeting of this company, held for the purpose of considering a resolution to wind up, the chairman on a show of hands did not count proxies. There is a question of fact raised whether he was asked to include the proxies. On the evidence, as it stands, I am of opinion that he was not so asked; but I will pass that by and deal with the general question which is raised. [His Lordship then read art. 60, and continued:—]

Then, if a poll is demanded under art. 61, certain proceedings have to be taken, and I need not read the rest of the article as to that. By art. 66 votes may be given either personally or by proxy.

(1) 11 Ch. D. 109.

(2) 5 Ch. D. 911.

(3) 52 L. T. (N.S.) 846.

CHITTY J.

1896

ERNEST

v.

LOMA GOLD
MINES,
LIMITED.

CHITTY J. Now that article does not say, in terms, that the votes may
1896 be given by proxy on a show of hands. I have never seen
such an article. I question whether any one has. I venture
to say that no one ever has.

ERNEST
v.
LOMA GOLD
MINES,
LIMITED.
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The two well known methods of voting in this country are by a show of hands and by a poll. What is the essence of voting by a show of hands? It is that the hands—one hand for every member present—are held up, the number of hands counted for the resolution, and the number of hands counted against, and the one is subtracted from the other. In that way there is the decision by a show of hands. It is the eye that is called upon to decide when this method is resorted to, with the simple process added of making a calculation of the result.

Now, if the proxies are to be counted, what is the chairman to do? It must be borne in mind that a man who holds a proxy is not bound to use the proxy. He may be told that if there are half-a-dozen resolutions he must vote this way on one question and that way on another, and not at all on others. Of course that is a matter between the principal member appointing the proxy and the proxy himself. But the proxy is not bound to vote, just as any member of the company present is not bound to vote.

Then, if the proxies are to be counted, what is the course of proceeding on this so-called show of hands? Having called for the show of hands, and having seen them and counted them, the chairman is told, I will assume, that there are proxies. Thereupon he must call for another show of hands of the proxies (because it is by show of hands that this voting is to take place); having done that he would not, even then, have got to the end of the necessary proceedings; because one man may hold one proxy and another man may hold ten proxies, and he must call, therefore, for the hands of the members who hold one proxy, then for those who hold two, and so forth until he has exhausted the whole. But that is not a show of hands. No one ever dreamed of that being the course to be pursued on a show of hands. He must do more. He must call for the proxies. In this case (which is a very

good illustration) the proxies were very numerous indeed. Then he must identify the member of the company who says he holds the proxy—who holds up his hand again on his call for votes by proxy, and he must examine the proxies then and there, and keep the meeting waiting. Then he must institute a scrutiny. This point is admirably illustrated by the facts in the present case, because the plaintiff impeaches no less than 25,436 proxies. Then it is said that effect is given to voting by proxy on this show of hands by attributing one vote to every proxy. That is not, according to the articles of association, attributing to each proxy its full value; because art. 62 of this company provides that a man shall have a vote for every share. Suppose he holds 1000 shares and he appoints a proxy, and another one holds 10,000 shares. I am told (this is the argument for the plaintiff) that by some strange process, which I have endeavoured to follow, but which I am unable to understand, that notwithstanding art. 62 that proxy on the show of hands is not to count 1000 or 10,000, as the case may be, but it is to count only one. That, probably, is so as not to give more voting to the proxies than would be given to the member who held up his hand. If the member holds up his hand it counts as one. There is no other method of counting practically possible. He does not vote according to his voting power. The man may have 10,000 or 100,000 shares, but he is only counted as one on the show of hands.

Then I am told that unless this counting of proxies is allowed the wishes of the members present by proxy would not have effect given to them. The answer to that is, in this case, as in all the other cases that I recollect, that a poll would be demanded; and here a poll could have been demanded. The number that is required to demand it (it is quite immaterial what the number is that is requisite to demand a poll) is very small. By the 60th article three members, holding at least one-tenth of the shares of the company, can demand a poll. If the persons who give the proxies will not take the trouble to appear, or get their friends and members to appear, in sufficient numbers to demand a poll, that is their fault; and it is not the fault of the persons who are present. The proxies come in

CHITTY J.

1896

ERNEST

v.

LOMA GOLD
MINES,
LIMITED.

CHITTY J. when the poll is demanded. In most cases there is an adjournment of the meeting; and article 61 provides that there may be an adjournment of the meeting for the purpose, and the very necessary purpose, of examining the proxies and going through the elaborate process of counting the proxies on the poll. I think it is a fallacy to say that the person who has given the proxy is disabled from voting unless you count his proxy on a show of hands.

1896
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 ERNEST  
 v.  
 LOMA GOLD  
 MINES,  
 LIMITED.

These reasons lead me to the conclusion that the chairman in this case was right. I think he adopted the course which the reasoning of the Court of Appeal in the case of *In re Horbury Bridge Coal, Iron, and Waggon Co.* (1) would have led him to take; and he also had in support of his view the judgment of the present Kay L.J., then Kay J., in the case of *In re Caloric Engine and Siren Fog Signals Co.* (2)

That case has been observed upon, and I asked for and obtained a copy of the articles of association, and I find that there was there, in those articles, a provision that votes might be given personally or by proxy. Kay J.'s decision was clear that you cannot use proxies on a show of hands, but that a poll must be directed to be taken for the purpose.

Against that decision there is the decision of Vaughan Williams J. in *In re Bidwell Brothers.* (3) I need not say that I treat anything that comes from him with the greatest respect; but I am bound, in this conflict of authority, to state my own opinion upon the subject, and, with reluctance, I express the opinion that Vaughan Williams J.'s decision is inconsistent with the authorities as they then stood, and is not well founded in principle. Possibly he might have arrived at a different conclusion had he known what the articles were in the case of *In re Caloric Engine and Siren Fog Signals Co.* (2) He says he did not know what those articles were.

A point was made by Mr. Cross on the 51st section of the Companies Act, 1862. It is said that that section compels the chairman, on taking votes by a show of hands, to count the proxies. I disagree. The resolution passed by the company is

(1) 11 Ch. D. 109.

(2) 52 L. T. (N.S.) 846.

(3) [1893] 1 Ch. 603.

to be passed by a majority of such members of the company for CHITTY J.  
 the time being entitled to vote according to the regulations of 1896  
 the company. The resolution is brought in and passed by a ERNEST  
 show of hands. I do not lay much stress on that being in the v.  
 articles, for that is the common way of ascertaining the view LOMA GOLD  
 of the general meeting—in person or by proxy. I will read MINES,  
 the words of s. 51. [His Lordship read the section, and LIMITED.  
 continued :—]

That, with great submission, has nothing to do with this particular mode of voting. The 51st section of the Companies Act, 1862, does not say that on the show of hands the proxies are to be counted. It still leaves that question to the general law on the subject. I think, so far from its being inconvenient, as Mr. Cross urged, that the proxies should not be counted on the show of hands, it would lead to great inconvenience if they were counted, and it would, in many cases, be impracticable; and I think that the observation made by a learned author on the subject, who has great experience—I mean Mr. Palmer—in his book on Company Precedents, 6th ed. vol. i. p. 338, is well founded. He says it is entirely foreign to common practice, and may, in some cases, involve great inconvenience. (1) I may add that I think it would cause not only great inconvenience, but it would not work practically at any ordinary meeting.

The result is, I decline to grant the injunction; and, as this is an important point and may be well worthy of consideration elsewhere, I dismiss the motion with costs to be paid in any event by the plaintiff.

Before parting with this matter I will, however, deal with the objection which has been raised on the part of the plaintiff to several proxies which were made use of at the meeting held in July for the confirmation of the resolution which was passed at the first meeting. [Having stated the facts as given above, his Lordship continued :—]

The question is whether the secretary had authority to fill up these blanks.

The post-card, I agree, would not give him that authority. A man cannot, by a letter or post-card, saying, “I shall assume

(1) And see too vol. ii. pp. 571, 572.

CHITTY J. authority," obtain authority. The post-card may be, for all practical purposes, left out of consideration altogether. No letter was received from any members of the company who sent in their proxies with the date of the meeting in blank in reply to this post-card. But I pass that by. I think that, seeing that the meeting was called for the day mentioned, and seeing that the proxy was asked for by the directors, and was to be returned to the secretary, the member intended the proxy to be used at the meeting in relation to which it was sent; and, in my opinion, the secretary had authority from the member to fill in the date—not to fill in any other date than the date indicated on the notice and on the circular letter which accompanied it, but to fill in that date. In my opinion it was but a slip on the part of the member in not filling in the date himself, and his intention, I think, on the facts, was clear that his proxy should be used at that meeting, and at that meeting only.

Then, the proxy not being a deed, of course the date could be filled in without invalidating the instrument by a person having authority to do so. I speak as to the common law. But Mr. Cross says that that is contrary to the Stamp Act of 1891. The 80th section of that Act is, "Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, and any adjournment thereof." The proxy as used did specify the day. The enactment is not that the person who gives the proxy must himself insert the date at the time that he gives the proxy. If the proxy had been used without the date, then the proxy would have been bad in virtue of what comes under the other part of the section. "Every person," says the 3rd sub-section, "who makes or executes, or votes, or attempts to vote, under or by means of any such letter or power of attorney or voting paper, not being duly stamped,"—the section provides for powers of attorney as distinct from proxies—"shall incur a fine of fifty pounds, and every vote given or tendered under the authority or by means of the letter or power of attorney or voting paper,

1896  
ERNEST  
v.  
LOMA GOLD  
MINES,  
LIMITED.  
—



shall be void"—that is to say, taking the material words, a proxy not duly stamped shall be void. These proxies were in my opinion duly stamped; the section does not affect this case, and I think that the proxies were valid, and were properly allowed by the chairman.

CHITTY J.

1896

ERNEST

v.

LOMA GOLD  
MINES,  
LIMITED.

Solicitors: *W. T. Hart; Powell & Burt,*

W. C. D.

NORTH J.

1896

July 9.

*In re* BINNS.LEE *v.* BINNS.

[1896 B. 1441.]

*Executor—Retainer—Legatee Debtor to Testator—Bankruptcy of Legatee.*

A father deposited with a bank a sum of 2400*l.* (money of his own) as a continuing security for any amount which might from time to time be owing to the bank by a firm in which two of his sons were the only partners. Interest on the deposit was from time to time paid by the bank to the father. By his will the father gave legacies and shares of residue to the two sons. At the date of his death the sons owed 8858*l.* to the bank, and the sons were afterwards adjudicated bankrupts. The bank proved in the bankruptcy for the whole 8858*l.* No dividend having yet been paid in the bankruptcy, but it being admitted to be improbable that the estate would realize enough to pay the bank in full, and that the bank would ultimately appropriate the deposit of 2400*l.* towards the payment of the firm's debt:—

*Held*, that the trustees of the father's will were not entitled to retain the legacies and shares thereby bequeathed to the sons against the liability of the father's estate as surety to the bank, but that the trustee in the bankruptcy was entitled to receive those legacies and shares.

SUMMONS by the trustees in the bankruptcy of J. H. Binns and F. W. Binns, as plaintiffs, against A. E. Binns and A. C. Durant, the trustees of the will of William Binns, as defendants, asking for the determination of the question whether the defendants, as trustees of the will, were entitled to retain against the plaintiffs certain legacies and shares of residue given by the testator's will to the bankrupts, or any and what part thereof, to satisfy a claim which the defendants had, or might have, against the joint estate of the bankrupts. This claim arose as follows:—

In July, 1894, J. H. Binns and F. W. Binns, two sons of the testator William Binns, were carrying on business as dyers in partnership, under the firm of J. & F. Binns.

On July 2, 1894, the testator placed on deposit in his own name with the Bradford Commercial Joint Stock Banking

Company a sum of 2400*l.*, and at the same time he addressed NORTH J.  
a letter to the bank as follows :—

“ I hereby declare that my deposit of 2400*l.* is lodged with you as a continuing security for any amount that may from time to time be owing to you by J. & F. Binns.”

The testator also delivered the deposit receipt for the 2400*l.* to the bank as security. In consideration of this security the bank allowed J. & F. Binns to overdraw their banking account to a large amount. Interest on the deposit was from time to time paid to the testator by the bank.

On May 30, 1895, the testator died; and at this time the current account of J. & F. Binns with the bank was overdrawn to the extent of 8858*l.*

The testator by his will bequeathed to each of his sons a legacy of 300*l.* and a sixth share of the residue of his estate. He appointed the two sons executors and trustees of the will. They proved the will. The value of the testator's estate (after deducting debts and funeral expenses) was about 6638*l.*

On October 10, 1895, a receiving order in bankruptcy was made against J. H. Binns and F. W. Binns, and on October 30, 1895, they were adjudicated bankrupts. The plaintiffs were appointed trustees of the joint and separate estates in the bankruptcy. J. H. Binns and F. W. Binns acted as executors and trustees of the testator's will between the date of his death and the bankruptcy; but on October 26, 1895, they appointed the defendants trustees of the will in place of themselves, and the trust estate was duly vested in the defendants. The bank proved in the bankruptcy against the joint estate in respect of the whole joint debt of 8858*l.* No dividend had yet been paid in the bankruptcy; but it was admitted that the estate was not likely to pay a dividend exceeding 7*s.* 6*d.* in the pound, and that the bank would in the event of a deficiency claim to apply the whole of the 2400*l.* deposited with them by the testator in further payment of the joint debt. The bank had not yet so applied the deposit, but it remained standing in the name of the testator.

The question was whether the trustees of the will were

1896  
In re  
BINNS.  
LEE  
v.  
BINNS.  
—

NORTH J. entitled to retain the legacies and shares of residue given by the will to the bankrupts against the 2400*l.* deposited by the testator with the bank as security.

1896

In re

BINNS.

LEE

v.

BINNS.

*Swinfen Eady*, Q.C., and *Scott Fox*, for the plaintiffs. There are two questions—(1.) Whether the trustees of the will are entitled to retain a benefit given by the will to one member of a firm against a joint liability of the firm to the testator's estate. (2.) Whether there is any debt in respect of which the trustees have any right of retainer. The trustees have no right to prove in the bankruptcy. The bank having proved for the whole debt due to them by the firm at the time of the testator's death, that debt is gone, and there cannot be double proof. There is no debt in respect of which the trustees have a right of retainer. Unless there were a right of retainer or set-off at the date of the bankruptcy it could not be acquired afterwards by taking a transfer of the right of proof of another creditor: *In re Milan Tramways Co.* (1)

*Vernon Smith*, Q.C., and *Turner*, for the defendants. The trustees of the will are entitled to say that the legatees have already received their shares under the will to the extent of 2400*l.*: *In re Watson*. (2) Neither a legatee nor any person claiming through him can be allowed to take anything out of the testator's estate until he has made good to the estate what he owes to it. At the time of the testator's death the sons were bound to indemnify his estate against the liability which he had incurred to the bank as their surety, and their subsequent bankruptcy cannot alter the right of the testator's estate to that indemnity. It is immaterial that the testator's executors cannot prove in the bankruptcy; the test is, what was the state of things at the time of the testator's death: *Cherry v. Boulton* (3); *Willes v. Greenhill* (4); *In re Watson* (2); *In re Whitehouse* (5); *In re Akerman*. (6) *In re Milan Tramways Co.* (1) has no application.

*Swinfen Eady*, Q.C., in reply. There cannot be double proof

(1) 25 Ch. D. 587.

(2) [1896] 1 Ch. 925.

(3) 4 My. &amp; Cr. 442.

(4) 29 Beav. 376.

(5) 37 Ch. D. 683.

(6) [1891] 3 Ch. 212.



in bankruptcy for the same debt against the same estate. If a debt were due from a beneficiary under a will to the testator, and after the testator's death the executor proved for the debt in the bankruptcy of the beneficiary, the executor would have no right of retainer or set-off: *Stammers v. Elliott*. (1) In the present case, by reason of the proof of the bank in the bankruptcy of the sons for the whole debt, there is no longer any debt in respect of which the trustees of the will have a right of retainer. The creditors having proved for the full amount, the surety cannot prove.

NORTH J.

1896

In re  
BINNS.LEE  
v.  
BINNS.

NORTH J. I think Mr. Swinfen Eady right in his contention. [His Lordship stated the facts, and continued:—]

The sons carried on the business, and they had the benefit of the security given by their father to the bank, because their account was overdrawn by more than 8000*l.*, and not 2400*l.* only. They had therefore, by reason of the deposit of this security by their father, received from the bank a very considerable sum which they would not otherwise have received. For the whole of that sum they are debtors, not to their father, but to the bank; and the security which the bank held from the father was a collateral security which did not, so long as it was unrealized, diminish to any extent the amount of the sons' debt. If the bank had chosen to realize it, they would have been compelled to apply the proceeds pro tanto in discharging the sons' debt; but so long as it was kept unrealized, as it has been in form down to the present time, the whole debt remained due from the sons to the bank, and the sons are liable to the bank, or, but for the bankruptcy, would have been personally liable to the bank, for the whole amount of the debt. Suppose that the sons had gone to the executors immediately after the father's death, and had pointed out to them that there was a large estate, and that they wished to receive their legacies; or suppose that a year had elapsed from the father's death, and that the time had therefore come at which they would have had a right to ask for payment of their legacies, and they had come and asked for them, the executors would then have been entitled

(1) L. R. 3 Ch. 195.

NORTH J. to say, "There is a matter still pending between your father's estate and you: he has become surety for you as principal debtors to the bank: he is entitled to have the security which he has given as your surety released, and to be indemnified by you against any claim which can be made by the bank upon the security, or upon himself as giving that security." It seems to me the executors would have been then in a position to say to the sons that, although they were not indebted in any particular amount to their father in respect of this transaction, they were bound to indemnify his estate against all liability by reason of his having become surety for them at their request. Under these circumstances the executors might have declined to pay over the legacies to the sons until the account had been worked out and the amount of the liability ascertained. Five months after the father's death a receiving order was made against the sons' firm; then the old trustees of the will were superseded by the new; and a few days after that the firm were adjudicated bankrupts. At that time the bank were creditors of the firm for upwards of 8000*l.*, and were entitled when they pleased to prove for that amount in the bankruptcy, and they have since proved for the full amount, and they have a right to have recourse to their security, leaving the proof standing.

How, then, does the matter stand between the testator's estate and the sons? The trustees of the testator's estate still say to the sons, "We will not pay over to you any part of your legacies or shares of residue till we have been indemnified by you." But the difficulty in their way is this—that there is no debt in respect of which the trustees of the will can at present claim to retain anything as against the trustees of the sons' estate. The claim against that estate is made by the principal creditors; and the surety cannot as against the principal creditors set up an adverse claim of any kind. No doubt when the principal creditors have been paid in full the position of matters would be different; but at present the principal creditors have a claim with respect to which, even after the security has been realized at its full amount, the dividends anticipated in the bankruptcy will still leave a very large sum owing to the bank. While that is so, it seems

1896

*In re*

BINNS.

LEE

v.

BINNS.

to me that there is no claim which the father's trustees can set NORTH J.  
up against the sons' estate in respect of which they have any  
right to retain a part of the father's estate. 1896

I think that the plaintiffs are right, and that the father's  
trustees are not entitled to the set-off they claim to make. *In re*  
BINNS. LEE  
v.  
BINNS.

Solicitors : *Steavenson & Couldwell, for Mumford, Johnson &*  
*Co., Bradford ; Jaques & Co., for J. W. Moore, Bradford.*

W. L. C.

KEKEWICH

J.

1896

June 25.  

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*In re* SMITH.  
DAVIDSON *v.* MYRTLE.

[1896 S. 610.]

*Trustee—Investment—“Company incorporated by Act of Parliament.”*

Where by a will made in 1895 trustees were empowered to invest in the bonds, debentures, or debenture stock of any “company incorporated by Act of Parliament” :—

*Held*, that the trustees were not authorized to invest in securities of companies incorporated by registration under the Companies Act, 1862.

*Elve v. Boyton* ([1891] 1 Ch. 501) distinguished.

ADJOURNED SUMMONS.

John Smith by his will dated April 13, 1895, gave and bequeathed his residuary personal estate to his trustees therein named, and declared that they should stand possessed thereof in trust to invest the same in their names in or upon any of the public stocks, funds, or securities of the United Kingdom, or any real or leasehold securities, or in or upon the bonds, debentures, or debenture stock of any company incorporated by Act of Parliament and paying a dividend on its ordinary stock or shares, with liberty for the trustees at their discretion to vary and transpose the investments from time to time for any other investment of the like description.

The testator died on December 5, 1895, and his will was duly proved by the plaintiffs, the trustees and executors, on December 31, 1895.

Questions having arisen as to the administration of the testator's estate, this summons was taken out by the plaintiffs against persons beneficially interested under the will as defendants for the determination by the Court, inter alia, of the question whether under the power of investment contained in the will the trustees had power to invest in or upon the bonds, debentures, or debenture stock of any company incorporated by registration under the Companies Act, 1862, or whether they were restricted to investing upon such securities of companies incorporated by private or special Acts of Parliament only.



*Renshaw, Q.C.*, and *Jason Smith*, for the plaintiffs. It is submitted that a company incorporated by registration under the Companies Act, 1862, is, equally with a company incorporated by a special Act, within the words "company incorporated by Act of Parliament" as used in this investment clause. The point appears to be covered by authority. In *Edwards v. Edmunds* (1) a trustee who was authorized to invest in shares in any public company incorporated by Act of Parliament had accepted new shares in a joint stock bank with unlimited liability, incorporated under the provisions of the Banking Act of 7 Geo. 4, c. 46, which shares were allotted to him in respect of old ones which he had retained as part of the trust estate under his power to retain investments; and Hall V.-C. said that the trustee was justified in accepting the shares, though under the circumstances of the case he was held liable for loss arising from the investment. Again, in *Elve v. Boyton* (2), a power to invest in the shares of a "company incorporated by Act of Parliament" was held to extend to shares in the London Assurance—a company constituted under a charter which derived its force from a preceding Act of Parliament. Companies registered under the Companies Act, 1862, are constituted by a memorandum of association under s. 7, which is equivalent to a charter, and, precisely as in *Elve v. Boyton* (2), derives its force from the Act of Parliament.

*Warmington, Q.C.*, *Warrington, Q.C.*, and *Lambert*, for one of the beneficiaries. We do not desire to offer any formal opposition to the view contended for on behalf of the plaintiffs, but it is right to observe that the point involved seems to be a very serious one. It has never been decided that a company incorporated by registration under the Companies Act, 1862, is a "company incorporated by Act of Parliament." That expression has generally been understood amongst lawyers as referring to a company incorporated by special Act of Parliament. In the Forged Transfers Act, 1891 (54 & 55 Vict. c. 43), s. 2, it is enacted that "the expression 'company' shall mean any company incorporated by or in pursuance of any Act of Parliament, or by Royal Charter," so that a distinction is expressly drawn

KEKEWICH  
J.

1896

*In re*  
SMITH.

DAVIDSON  
*v.*  
MYRTLE.

(1) 34 L. T. (N.S.) 522.

(2) [1891] 1 Ch. 501.

KEKEWICH J. 1896  
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In re
 SMITH.
 DAVIDSON
 v.
 MYRTLE.
 —

between a company incorporated by an Act of Parliament and a company merely incorporated in pursuance of an Act of Parliament. So, in the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, sub-ss. (g), (l), and (n), the expressions "company incorporated by special Act of Parliament," "by special Act of Parliament or by Royal Charter," and "by Act of Parliament for the purpose of supplying water," are used and discriminated. In no text-book of authority has *Elve v. Boyton* (1) been treated as extending to companies registered under the Act of 1862. *Elve v. Boyton* (1) was the case of a company which was incorporated by Royal Charter deriving its force from an Act of Parliament specially directed to that particular purpose, and which thus individually received the recognition of the Legislature. There is a wide difference between such a company and one formed by private adventurers, at their own will and pleasure, by registration under the general provisions of the Companies Act, 1862. There is nothing in that Act to shew that companies registered under its provisions are to be deemed to be companies incorporated by it.

Haldane, Q.C., and Methold, Bramwell Davis, Q.C., and Owen Thompson, and A. àBecket Terrell, for other beneficiaries.

Renshaw, Q.C., in reply. The principle of *Elve v. Boyton* (1) is clearly applicable: see, in particular, the observations of Lindley L.J. (2) The decision in that case has made a change in the views previously entertained by conveyancing lawyers.

KEKEWICH J. Before I decide this question I must ascertain whether I am free to express an opinion upon it. If it has been decided by Hall V.-C., and still more, if it has been decided by the Court of Appeal, my only duty is to follow that which has been decided.

As regards the case of *Edwards v. Edmunds* (3), before Hall V.-C., I fail to see that the point submitted to me was there decided by the Vice-Chancellor. The contention that the company in that case was not a company incorporated by Act of Parliament, was, no doubt, submitted to the Vice-Chancellor,

(1) [1891] 1 Ch. 501.

(2) [1891] 1 Ch. 508.

(3) 34 L. T. (N.S.) 522.

and he did not decide against it ; but I do not think that that was really the question which was present to his mind. There was in that case a power to retain investments ; and when the Vice-Chancellor found that the trustees holding shares in a joint stock company incorporated under 7 Geo. 4, c. 46, had done their duty, or had not committed a breach of trust, he did so, not because they were empowered to invest in that way, but because they were empowered to retain such an investment. As regards the new shares, he certainly did hold that the trustee was not wrong in accepting them, though he would have been perfectly justified in refusing to take them ; in other words, that he had a discretion in the matter. That does, no doubt, logically imply that the trustee was at liberty to accept the new shares ; but the case does not go further than that, and it is certainly not a neat decision on the point now submitted to me.

Then comes the case of *Elve v. Boyton* (1), the decision in which is much more nearly in point. The company in that case was not incorporated by special Act of Parliament devoted to the purpose of its incorporation, but by Royal Charter granted in pursuance of an Act of Parliament, whereby an authority, or, as lawyers term it, a “power,” was given to the Crown to incorporate the company. Lindley L.J. uses the very word. “It empowers,” he says (2), “the Crown to grant charters of a particular kind—to grant charters which the Crown could not grant apart from the provisions of this Act of Parliament. It empowers the Crown to grant charters of incorporation to persons who should be liable for calls, amongst other things, which the Crown could not do” ; and then he says (3) : “The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter.” It is in strict analogy to my mind to a power in a deed, exercised say by will, in which the ultimate donee takes both under the deed creating the power and under the will exercising it. Lindley L.J. also

KEKEWICH
J.
1896
In re
SMITH.
DAVIDSON
v.
MYRTLE.
—

(1) [1891] 1 Ch. 501.

(2) [1891] 1 Ch. 507.

(3) [1891] 1 Ch. 508.

KEKEWICH says: "It appears to us that, upon any reasonable construction of this clause, this first corporation was a corporation incorporated by Act of Parliament within the true meaning of that clause." That seems to me to be a different question from that which I have now to decide.

J.
1896
~
In re
SMITH.
DAVIDSON
v.
MYRTLE.
—

In that case the power was given to the Crown; but it is quite consistent with the practice of the Legislature to confer the power to create a corporation on a Department of the Executive, as is often now conveniently done by means of Provisional Orders, which are subsequently confirmed by Act of Parliament, grouping several of them together, and giving them the force of legislative enactments. In all such cases the companies, though not incorporated directly by particular Acts of Parliament, are incorporated by instruments having the force and effect of Acts of Parliament under powers specially delegated by the Legislature. It does not appear to me that cases of that kind are precisely analogous to the case before me, and I do not find in the reasoning of the Lords Justices in *Elve v. Boyton* (1) materials sufficient to guide me in the present case. It seems to me that there is a very great distinction between a corporation incorporated by the Crown or by a Department of the Executive, under powers delegated by the Legislature, and a company incorporated by seven persons complying with certain statutory rules, and thereby creating a corporation, which after all may be very little more than a sham. I confess to a strong inclination of opinion that amongst conveyancers the expression "company incorporated by Act of Parliament" has for many years been generally accepted as meaning a company incorporated by Act of Parliament directed to that particular end. No doubt in many of the forms the words "by special Act of Parliament" are inserted, and sometimes the words "or by Royal Charter" are added; but that is by no means always so; and I think that if you had asked one of the old conveyancers what was meant by a company incorporated by Act of Parliament, he would have said, "A corporation which owes its origin to a special Act of Parliament."

(1) [1891] 1 Ch. 501.

Under these circumstances I think that, as I am not bound by authority, I ought to follow the bent of my own opinion by saying that the expression "company incorporated by Act of Parliament," as used in the power of investment in the will of this testator, is not equivalent to "company incorporated by registration under the Companies Act, 1862"; and the question in the summons must be answered by saying that the trustees have no power to invest in or upon the bonds, debentures, or debenture stock of any such company.

KEKEWICH
J.
1896

In re
SMITH.
DAVIDSON
v.
MYRTLE.

Solicitors: *R. S. Taylor, Son & Humbert; William Stubbs, for Hirst & Capes, Harrogate; Theodore Allingham.*

C. C. M. D.

ROMER J.

1896

July 14.

In re WOOD.ATTORNEY-GENERAL *v.* ANDERSON.

[1894 W. 3054.]

Escheat—Proceeds of Sale of Realty not effectually disposed of—Intestates
Estates Act, 1884 (47 & 48 Vict. c. 71), ss. 4, 7.

A testatrix died without an heir, having devised a house of which she was legally seised in fee simple to her executors, upon trust for sale, and out of the proceeds to pay her debts, funeral expenses, and legacies. There was no gift of residue :—

Held, that the balance of proceeds of sale, after paying the debts, expenses, and legacies, did not belong to the executors for their own benefit, but escheated to the Crown.

ELIZABETH SHARP WOOD, spinster, died on November 20, 1893, having by her will, dated May 21, 1890, devised a house at Twickenham, of which she was legally seised in fee simple, unto “my executors, who shall sell the same as soon as conveniently may be after my decease, and whose receipt for the purchase-money shall be a good and sufficient discharge to the purchasers thereof.” And the testatrix thereby directed that after payment of the expenses of the sale the balance of the purchase-money should form part of her general personal estate. She also directed that her debts, funeral and testamentary expenses, and legacies should be paid out of her general personal estate, and, after giving certain legacies, she appointed William Anderson and Frederick Bernard, senior, her executors. The will did not contain any gift of the residue. The executors proved the will and sold the house, and, after paying the debts, funeral expenses, and legacies, had still a balance in hand, which in part represented the proceeds of the sale of the house.

There were no heirs or next of kin of the testatrix, but she was believed not to be illegitimate.

The executors claimed that as the will contained no express disposition of the residue they were entitled for their own benefit to the balance of the proceeds of sale.

An action was brought by the Attorney-General for the

administration of the estate and incidental relief; and at the trial the question was raised whether the Crown was not entitled to the balance under ss. 4 and 7 of the Intestates Estates Act, 1884 (1), which was passed on August 14, 1884.

Ingle Joyce (Sir R. E. Webster, A.-G., with him), for the plaintiff. The Crown is entitled to the undisposed net proceeds of sale until an heir is found. The heir, if any, would be entitled to the net proceeds: *Ackroyd v. Smithson*. (2)

In default of an heir, the executors, having the legal estate, would but for the Intestates Estates Act, 1884, be beneficially entitled to the net proceeds of sale; but the Act was intended to alter the law. The material provisions of it are ss. 4 and 7.

The effect of s. 4 is that an equitable estate in respect of which a person dies intestate is to escheat to the Crown just as it would if it were a legal estate. The effect of s. 7 is that, if any beneficial interest in real estate is not effectually disposed of, the testator is for the purposes of the Act to be deemed to have died intestate in respect of it. In other words, we are thrown back on s. 4, under which the law of escheat is applied to that interest. The Act is not happily worded, but the result of the two sections is that the undisposed of beneficial interest—in this case the residue of the proceeds of sale—escheats to the Crown.

Neville, Q.C., and *Ribton*, for the executors. It is impossible to say what the Legislature intended, but it has certainly not said enough to entitle the Crown to the net proceeds of sale.

(1) 47 & 48 Vict. c. 71:—

Sect. 4: "From and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

Sect. 7: "Where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person therein was legal or equitable, is, owing to the failure of the objects of the devise, or other circumstances happening before or after the death of such person, in whole or in part not effectually disposed of, such person shall be deemed, for the purposes of this Act, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of."

(2) 1 Bro. C. C. 503.

ROMER J.

1896

In re
WOOD.

ATTORNEY-
GENERAL
v.
ANDERSON.
—

ROMER J. In this Act it has carefully distinguished an equitable interest from a beneficial interest. Sect. 4 only relates to the case of a person dying intestate in respect of an equitable interest in corporeal hereditaments, and the testatrix was not such a person. Sect. 7 does not relate back to s. 4, because the net proceeds were not an equitable interest, and were not an interest in a corporeal hereditament. The heir takes the proceeds as personal estate, and they come to him under something in the nature of a resulting trust.

1896
In re
 WOOD.
 ATTORNEY-
 GENERAL
v.
 ANDERSON.

[ROMER J. If land had been devised to trustees upon trust for sale, and to hand over the proceeds to a hospital, would not the proceeds of sale have been an interest in land to which the Mortmain Act would have applied?]

Proceeds of sale of real estate are by the Mortmain Act expressly placed under the same prohibition, as regards charities, as land, and therefore the Mortmain Act is not a guide in the present case. There is a distinction between an intestacy as regards land and an intestacy as regards the proceeds of sale of land, the former going to the heir as real estate and the latter as personalty. The proceeds of sale are a beneficial interest, but not an equitable interest. The beneficial interest of the executors can only be taken away by an enactment in clearer terms than those of this statute. Sect. 7 recognises a beneficial interest in respect of a legal estate; but that does not come within s. 4, which only gives the Crown a title by escheat where the interest is equitable, and does not deal at all with a beneficial interest. The testatrix in this case died seised of the legal estate in which she had a beneficial interest, and the Act has no application to such a case.

ROMER J. I think the Attorney-General is right in this case. I cannot say the sections of the Act are altogether free from difficulty; but it appears to me that the net proceeds of sale of the house devised by this lady were a beneficial interest in her real estate, which, under the provision of s. 7 of the Act was not effectually disposed of; and therefore the lady is to be deemed to have died intestate in respect of that beneficial interest. It was a beneficial interest in a corporeal heredita-

ment; and if it was a beneficial interest, was it legal or was it equitable? It was equitable. Therefore she is to be taken for the purposes of the Act to have died intestate in respect of that equitable interest in that corporeal hereditament.

That being so, then comes the provision of s. 4 of the Act, which says that where a person dies intestate in respect of any equitable interest in any corporeal hereditament the law of escheat shall apply in the same manner as if the estate or interest had been a legal estate in corporeal hereditaments. It follows, therefore, that the law of escheat applies to this equitable interest, and that the Attorney-General is right.

Solicitors: *Hare & Co., for Solicitor to the Treasury; Woodbridge & Sons, for Senior & Lambert, Richmond, Surrey.*

F. E.

ROMER J.
1896
~~~~~  
*In re*  
WOOD.  
ATTORNEY-  
GENERAL  
*v.*  
ANDERSON.  
—

C. A.

*In re* TRADE-MARK No. 58,405, "BOVRIL."

1896

June 11, 12.

*Trade-mark*—"Fancy Word not in common use"—*Patents, Designs, and Trade Marks Act, 1883* (46 & 47 *Vict. c. 57*), s. 64.

In 1886 J. registered as a trade-mark for substances used as food or as ingredients in food the word "Bovril," which he had invented, and which up to the time of registration he had never used. He made over his business and trade-mark to a limited company. The best known of the articles sold under this mark was a fluid extract of beef which was issued under the name of "Fluid Beef, Brand Bovril," but the article being extensively sold, and called by the public "Bovril," the company adopted this name and described it as "Bovril" in their advertisements. In 1896 a rival trader applied to expunge the word from the Register of Trade Marks on the ground that it was not a "fancy word," but as applied to articles derived from beef it was descriptive, and as to articles not so derived was deceptive:—

*Held* (affirming the decision of Kekewich J.), that at the time when the mark was registered "Bovril" was a "fancy word not in common use," and therefore might properly be registered as a trade-mark under the Patents, Designs, and Trade Marks Act, 1883, and that it was not a descriptive word, for although "Bov." might suggest the idea of an ox, the word as a whole would not at that time convey any meaning.

THIS was an appeal by John Rosetree from the refusal of Kekewich J. to expunge the word "Bovril" from the Register of Trade Marks.

Rosetree deposed that, having determined to add to his business the manufacture and sale of meat fluids and extracts, he considered that the most comprehensive word to describe his manufacture was a single word, and that he chose "Bovril" (being a known word), and gave instructions for printing labels accordingly. That he immediately learnt in the trade that "Bovril" was a registered trade-mark. That the result of such registration so far as the trade was concerned was absolutely to restrict the sale of any fluid beef or meat extract under the name of "Bovril" except such as was manufactured and sold by the registered proprietors of the trade-mark. That "Bovril," as its name implied, was a meat extract and was described by the manufacturers in their labels as fluid beef. That the word "Bovril" represented the material itself and was not a trade-

mark of the article, and that the substance itself, "Bovril," was known and called by that name.

C. A.

1896

*In re*

TRADE-MARK  
No. 58,405,  
"BOVRIL."

Johnston, the vice-chairman and a director of Bovril, Limited, the holders of the trade-mark, deposed, that before November, 1886, he had been dealing, among other things, in preparations of meat, and had given attention to devising a convenient preparation of meat which should combine more of the nutritive constituents of meat than the extracts at that time in use, and ultimately hit upon a special method of preparing extracts from meat which appeared to him to carry out what he thought was required. That before putting his improved meat extracts on the market he determined upon adopting a trade-mark, and upon taking for this purpose a word which he could use and always intended to use in connection, not only with his improved meat and chicken and cereal preparations, but upon other articles of food which might be conveniently sold therewith. That he accordingly coined the word "Bovril," which to the best of his belief was an entirely novel word, and that on November 2, 1886, he registered the word "Bovril" for substances used as food or as ingredients in food under No. 58,405 in Class 42. That when he registered the mark he had never used it, and that he intended it should be used, not only upon preparations of meat, chicken, and cereals, but also upon other articles which might be conveniently sold therewith, and that the mark had in fact been so used. That in 1889 Bovril, Limited, was incorporated and took over the deponent's business and trade-mark. That since its incorporation the company had carried on extensively the manufacture and sale of Fluid Beef, Brand Bovril, and other specialities, including Bovril Lozenges, Bovril Peptone of Beef, Bovril Beef Jelly, Bovril Celery Salt, Bovril Wine, Bovril Cartridges, Bovril Emergency Food, and had used the term "Bovril" as the distinctive part of the name of all the articles. That the "Bovril" specialities of the company's manufacture had become widely known, and any person using the word "Bovril" in reference to an article of food expected and intended to get the company's manufacture. That the most popular of the company's articles was its fluid beef, which was

C. A.  
1896  
*In re*  
TRADE-MARK  
No. 58,405,  
"BOVRIL."

put upon the market under the title of "Fluid Beef, Brand Bovril," and was still sold under that name. That when an article is put on the market under a lengthy name it is common for the trade and the public to pick out a word or two from the title and call the article by this as a shorter title, and that thus the last-mentioned article came to be commonly spoken of as "Bovril." That this company, therefore, began to use, and had ever since used in most of their advertisements, the popular title "Bovril" instead of "Fluid Beef, Brand Bovril," and the word had come to designate the company's fluid beef. That "Bovril" when applied to an article did not in November, 1886, and does not now, imply that the article is a meat extract: thus, for instance, Bovril Celery Salt does not contain any meat extract.

Kekewich J. refused the application, and Rosetree appealed.

*Spencer Bower*, and *Drew*, for the applicant, John Rosetree, in support of the appeal. According to the authorities a fancy word must be a non-descriptive word, and the learned judge of the Court below has decided that "Bovril" is a non-descriptive word. But our contention is that as applied to extract of beef it is a highly descriptive word, while if applied to an article which has nothing to do with beef it is a deceptive word, and as such a bad trade-mark under s. 73 of the Act of 1883. "Bovril" is apparently compounded of "bov," which is obviously derived from the latin word "bos," an ox, the genitive of which is "bovis" (from which, again, many English words such as "bovine" are derived), and "ril," which is a diminutive as used in "tendril" and other words. Accordingly, "Bovril" is not, as the learned judge has held, a fancy word not in common use: *In re Van Duzer's Trade-mark and Leaf, Sons & Co.'s Trade-mark* ("Melrose" and "Electric Velveteen") (1); *Waterman v. Ayres* ("Reversi") (2); *In re Farbenfabriken Application* ("Somatose"), (3)

*Moulton, Q.C.*, and *John Cutler*, for the respondents. The real question is whether the word "Bovril" was a descriptive word for this article at the time it was placed upon the register.

(1) 34 Ch. D. 623.

(2) 39 Ch. D. 29.

(3) [1891] 1 Ch. 645.



and not whether it has since become so. At the time of the registration it was a coined word which had never been used before, and which nobody understood, and was rightly placed upon the register. The word has now come to denote the article; but that was because it had such a large sale and the public adopted this word as its name. Is the success of the article to invalidate the mark? If so, the Court will have given to the statute an interpretation which will make a trade-mark like this protective only when the article itself is a failure. Why should the Court smooth the way for a person who wants to take advantage of a rival's success? The statutory definition with which the Court has to deal is "a fancy word not in common use." *Van Duzer's Trade-mark* and *Leaf's Trade-mark* (1) were both cases of ordinary English words, the adoption of which as a trade-mark the Court considered dangerous. They are cases of quite a different character to the present, and have given rise to the idea that "fancy" means extravagant. In *Waterman v. Ayres* (2), again, "Reversi" was a French word. The *Farbenfabriken Case* (3), like *Van Duzer's Case* (1), was an application to register, and the applicant's own explanation of the word shewed that it referred to the character or quality of the goods.

In *In re Densham's Trade-mark* ("Mazawattee") (4) the Court recognised that some of the cases had gone too far, and held that the word "Mazawattee," which was a compound of two words in different foreign languages, not being a geographical name, was a good trade-mark as a fancy word under the Act of 1883, and an invented word under the Act of 1888. "Bovril" is a good created word. *Van Duzer's Case* (1) and the *Somatose Case* (3) were cases of application to register. Here the application is to remove a mark which has been on the register nearly ten years, and unless it is a clearly improper one it ought to be allowed to remain.

*Bower*, in reply. The Courts have decided that a "fancy word" must be "obviously meaningless," and, a judicial interpretation having been put on the words of the statute, it is unnecessary

C. A.

1896

*In re*

TRADE-MARK  
No. 58,405,  
"BOVRIL."

(1) 34 Ch. D. 623.

(3) [1894] 1 Ch. 645.

(2) 39 Ch. D. 29.

(4) [1895] 2 Ch. 176.

C. A.  
1896  
*In re*  
TRADE-MARK  
No. 58,405,  
"BOVRIL."

to refer further to the statute. It is enough for me to shew a doubt whether "Bovril" is not descriptive. *In re Densham's Trade-mark* (1) is not against me, for "Mazawattee" has no meaning in any known language. The case of *In re Sir Titus Salt, Bart., Sons & Co.'s Application* ("Eboline") (2) shews that a new suffix will not prevent the word from being descriptive: so "bovril" is no better than "bovine." Mr. Moulton contends that a fancy descriptive word is admissible; but *In re Van Duzer's Trade-mark* (3) and *Waterman v. Ayres* ("Reversi") (4) dispose of that. When a man invents a thing and gives it a name, that name cannot be registered as a trade-mark: *In re Leonard & Ellis's Trade-mark* ("Valvoline"). (5)

[LINDLEY L.J. There the word had got a meaning before application was made to register it as a trade-mark.]

The observation of Fry L.J. in the *Reversi Case* (4) and of Lord Selborne L.C. in the *Valvoline Case* (6) support our contention on this head. Taking off the register and refusing to put on the register are governed by the same rule: *In re Talbot's Trade-mark*. (7) I say, then, that supposing the burden is on me to shew that the word is descriptive, I have done so. But there is no such onus on me: it is enough for me to shew that the word is not "obviously non-descriptive": *Valvoline Case*. (5) In the interest of the public the mark ought to be removed: *In re Wragg's Trade-mark* (8); *Baker v. Rawson*. (9)

LINDLEY L.J. I do not think we need reserve our judgment. Mr. Bower has treated us to a very ingenious argument, and has done his best, by a process of logic, to force us to do that which, I think, is wrong. He has asked us to substitute some expressions which fell from us in a judgment for the language used in an Act of Parliament. Having got so far, he has tried to drive us to do what, I think, would be a gross injustice. We will not do that if we can help it. What we have to consider is

(1) [1895] 2 Ch. 176.

(2) [1894] 3 Ch. 166.

(3) 34 Ch. D. 623.

(4) 39 Ch. D. 29.

(5) 26 Ch. D. 288.

(6) 26 Ch. D. 299.

(7) W. N. (1894) 12; 11 Rep. Pat. Cas. 77.

(8) 29 Ch. D. 551, 556.

(9) 45 Ch. D. 519, 534.

whether, on November 2, 1886, Mr. Johnston was entitled to register, as a trade-mark for food in Class No. 42, the word "Bovril." We have to consider that with reference to the Act of Parliament which was then in force, which is the Patents, Designs, and Trade Marks Act of 1883 (46 & 47 Vict. c. 57). We have to look at s. 64 first of all, with reference to this point. It says: "For the purpose of this Act, a trade-mark must consist of or contain at least one of the following essential particulars: (a) a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (b) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or (c) a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." We have got to ask ourselves this: Was the word "Bovril," on November 2, 1886, a distinctive fancy word not in common use? Now, pausing there, and not referring to the decisions for the moment, can anybody say, with truth, that "Bovril" was not then a fancy word not in common use? I confess my powers are unequal to the task; I cannot do it. It is admitted that the word was new. It is admitted that it was one that was never heard of before. If such a word as that is not to be deemed a fancy word, it is very difficult to say what is. Then Mr. Bower says, "Well, that might be, if this were a decision in 1886 or 1887; but the Appeal Court has said what is meant by a fancy word, and it has said that nothing can be a fancy word which is not obviously non-descriptive." He says that "Bovril" is not obviously non-descriptive. He says that on the contrary it describes "ox" and it means "ox." Let us look at that a little carefully. In the first place, let us look at what this Court has said on the subject. In *Van Duzer's Case* and *Leaf's Case* (1), cases in which a coined word was not under consideration at all, but ordinary English words were under consideration, the Court said, that a common word will not do. You have got a fanciful use of a known word. You must have a word which is obviously non-descriptive. I agree that the Court went a step further in the *Somatose*

C. A.

1896

In re

TRADE-MARK  
No. 58,405,  
"BOVRIL."

Lindley L.J.

(1) 34 Ch. D. 623.

C. A. Case (1), which turned upon the Act 51 & 52 Vict. c. 50,  
 1896 s. 10, in which we have the expression "an invented word  
 In re or invented words, or a word or words having no reference  
 TRADE-MARK to the character or quality of the goods." The decision of the  
 No. 58,405, "BOVRIL," *Somatose Case* (1) I accept with all loyalty, although I did not  
 Lindley L.J. agree with it. It is to the effect that "Somatose" was not an  
 invented word, and was not non-descriptive within that section.  
 We did not differ about anything more than this. I thought  
 it was an invented word, and the other members of the Court  
 thought it was not. I thought it was not descriptive; they  
 thought it was. That is all. But I disregard that case except  
 for this purpose, namely, to shew that that was the ground of  
 the decision. It would be altogether wrong for us to take the  
 Act of 1883 and substitute for the words "fancy word" "a non-  
 descriptive word." That is not the language of the Legislature.  
 But I agree that a word which describes the article to which  
 it is applied will not do. Let us therefore ask ourselves  
 whether "Bovril" is a descriptive word. To my mind, it is not  
 descriptive, notwithstanding Mr. Bower's very ingenious argu-  
 ment. He tries to make it out to be a descriptive word, not by  
 taking the word, but by taking a little bit of it, and he says  
 that because "Bov" may have some relation, and does have  
 some relation to "ox," therefore "Bovril" describes—what?  
 I do not see that it describes anything at all. Does it  
 cease to be a fancy word not in common use? If it is so  
 descriptive as to cease to be a fancy word not in common  
 use, well and good; but if the description is only to be got at  
 by the ingenious suggestion that "Bov" must mean "ox," we  
 must ask what the whole word means. No one knows—no one  
 ever heard of it; I have not the slightest idea what "Bovril"  
 really means as a word. I followed Mr. Bower's argument, and  
 am quite alive to the fact that it has been applied to extract of  
 meat. At the time when this word was first coined can one  
 say more than this: that it had some relation, or might have  
 some relation or application to an ox? Is that descriptive so as  
 to destroy its character as a fancy word? The real truth is  
 that this is a fancy word not in common use. I think the test



suggested by Mr. Moulton is a correct one. I think it is eminently and purely a question of fact. Now, I ask myself this: Supposing that a jury were asked to say whether, on November 2, 1886, "Bovril" was a fancy word not in common use, and supposing they said, upon a direction from the judge, which I think it would be the duty of the judge to give, that if they were of opinion that it really intelligibly described the thing sold it would not do, could they, with that direction, reasonably say it was not a fancy word not in common use? I do not think they could. That really settles the matter. In my judgment the appeal fails, and must be dismissed, with costs.

C. A.

1896

*In re*

TRADE-MARK

No. 58,405,

"BOVRIL."

Lindley L.J.

LOPES L.J. The words with which we have to deal are the words "fancy word not in common use." Those words are contained in the 64th section of the Act of 1883. They are the words of the statute. In determining whether any particular word is a fancy word we must look at the statute, aided, as has been properly said, by any decisions that may have been given with regard to it. It is the statute we look at. I cannot agree with Mr. Bower when he suggests that, if the words "fancy word" have been interpreted by the Court, we must look at the interpretation, neglecting the statute, and substituting, as it were, for those words the interpretation put upon them by the Court, with very little reference to the statute. The statute is the dominant matter to be considered in determining whether any particular word is a fancy word not in common use within the meaning of s. 64.

It is always material to consider the time when the particular word was placed on the register. We must consider that time, and we must not criticise the word by what has happened subsequently, and what has subsequently become known as to it. We must look at it by the light of the time when it was placed there, and that is the year 1886.

Now, in 1886 the word "Bovril" was clearly a new word coined for the occasion. It can be found in no dictionary. It was not known in any language. In my opinion it stands on a different footing from the words "Melrose" and "Electric" used in the Van Duzer and Leaf cases, because they were old

C. A.  
1896  
*In re*  
TRADE-MARK  
No. 58,405,  
"BOVRIL."  
Lopes L.J.

words well known in the English language, and with an established meaning. I hold entirely to the definition of a fancy word which was given in those cases, namely, that to be a good fancy word it must be obviously meaningless as applied to the article in question. It must be fanciful in its application to the article to which it is applied in the sense of being obviously and notoriously inappropriate, so as to be neither deceptive nor descriptive, nor calculated to suggest deception or description. I believe those were my own words; but I do not think they differ in any way from that which was held by the other members of the Court. Now, apply that to the word "Bovril." It is said that the word "Bovril" indicates that the substance in question was made from beef, for that the first syllable, "Bov," relates to the animal from which beef comes—"Bos" "bovis," an "ox." In my judgment, you must look at the whole word, and not at part of it. The combination of that part of the word with the rest of it may be such as to make the word in its totality meaningless and non-descriptive. That is the view that I take of the word "Bovril," and I cannot think that, in 1886, when that was placed upon the register, it would have conveyed to the mind of an ordinary Englishman any idea involving any connection with "bos" or "bovis," or with "beef."

Mr. Bower has argued this case with exceeding ability. His strongest case, to my mind, was the *Somatose Case*. (1) But I think this observation is to be made with regard to that case—that every case must be determined according to its particular circumstances, and that a word may strike some minds as being a fancy word which would not so strike the minds of others. Moreover, the *Somatose Case* (1) was decided under a different Act of Parliament, where different words were used. I bow to that case, although I venture to think that, in all probability, I should place my judgment on the side of the learned judge who was in the minority. However, there is the case, and this Court is bound by it.

Now, to ascertain whether the word "Bovril" is a fancy word, I test it in this way—the way with which I am most

(1) [1894] 1 Ch. 645.

familiar. I say to myself, What would an intelligent jury say if they were asked whether "Bovril" was a fancy word? If I had had to try the case, I should have told them that they must keep in their minds that this word was placed upon the register in 1886, and that they must regard it as it stood at that time. I should have told them that to be a good fancy word it must be non-descriptive and meaningless as applied to the article to which it was intended to be applied, and, if I had so told them, I am confident they would have come to the conclusion that the word was not descriptive, and that it was a good fancy word. I come, therefore, to the conclusion that the appeal ought to be dismissed.

I have only to add that, much as I admire Mr. Bower's argument, I have not much sympathy with his client, because I cannot disguise from my mind that the object of this application is to obtain the benefit of a very large business, which since 1886 has been gradually built up by his opponents, and from which, if he succeeded here, he would get a very large benefit.

RIGBY L.J. I am of the same opinion. My judgment is shortly founded upon this. We have to determine whether "Bovril" was "a fancy word not in common use." We get rid of the words "not in common use" at once, as "Bovril" was not in use at all. Then we have to deal with "a fancy word." I am bound to say I do not know what would be a fancy word if this is not one. I have no kind of doubt about it. Then Mr. Bower, whose argument I have listened to with great interest, and who, I think, has said everything that can possibly be said on his side of the question, tries to place us in a dilemma by telling us that there are cases—beginning with *Van Duzer's Case* (1)—which drive us into the conclusion that this is not a fancy word, and that the Court has committed itself so far that only the House of Lords can set it right. But when we look at *Van Duzer's Case* (1), and I think the same, in fact, may be said of all the cases, we see that there was an attempt to create a secondary meaning of the word "fancy." "Melrose"

C. A.

1896

*In re*TRADE-MARK.  
No. 58,405.  
"BOVRIL."

Lopes L.J.

C. A.

1896

In reTRADE-MARK  
No. 58,405,  
"BOVRIL,"Rigby L.J.

is not a fancy word. "Electric" is not a fancy word—it is an ordinary English word, and I can only read that judgment as saying: "It may be that if you apply an ordinary word in such a manner that the application of it in that particular case is fanciful, it would be a fancy word; but that is extending the Act, and if you ask us to extend the Act in that way you must take care that the word taken, if a common ordinary word, is of such a nature that it is obviously unmeaning as applied to the particular case—that it is obviously non-descriptive."

I will only say, as regards the word "Bovril," that even if it could be shewn that it is, when interpreted, a descriptive word, I cannot imagine that such an idea would occur to the ordinary Englishman; and I think I cannot better express my meaning than by referring to the *Somatose Case* (1) to see what the test there was. To bring the word within s. 10, sub-s. (e), of the Act of 1888, which was attempted to be done there, you had to shew that it was a word having no reference to the character or quality. I am by no means prepared to say that if that were the test here I could say that the word "Bovril" has no reference to character or quality. When we know what it means it appears to me, at any rate, a very plausible argument, if no more than plausible, to say that it has an obvious reference to the character of the article as derived from an ox, though it is so wrapt up that the ordinary man might not see it. But in this case we have not to deal with those words. The Act of 1888 was passed because the test of fancy words not in common use had not turned out a satisfactory one. Whether the substituted words are better or not is a different question altogether; but we have now to deal with the words of the Act of 1883, and I quite agree that by no stretch can we hold that "Bovril" is not a fancy word.

Solicitor for appellant: *Joseph Davis.*

Solicitor for respondents: *C. U. Fisher.*

(1) [1894] 1 Ch. 645.

H. C. J.



## EHRMANN v. EHRMANN.

[1894 E. 762.]

C. A.

1896

July 1.

*Practice—Examination of Witnesses abroad—Letters of Request.*

A commission or letters of request for the examination of witnesses abroad ought not to be issued unless the evidence which it is proposed to obtain is evidence directly material to an issue in the cause, and not merely evidence which may be incidentally useful in corroboration of other evidence.

In an action for a dissolution of a partnership in England between wine merchants, on the ground of alleged misconduct of the defendant, the plaintiffs alleged that the defendant had bribed an employee of Pickford & Co. to inform him of the names and addresses of persons to whom Pickford & Co. forwarded wines on behalf of Continental wine merchants, so that the firm might canvass those persons for orders, and that this became known, and brought the firm into bad repute. The books of Pickford & Co. during the period to which this charge related had been destroyed. The plaintiffs set out a list of the names and addresses of the persons and firms to and by whom wines had been sent through Pickford & Co., and applied for letters of request to examine witnesses in Germany for the purpose of proving that wines were forwarded on their behalf during the period in question by Pickford & Co. Stirling J. ordered the letters of request to issue unless the defendant made admissions as to the forwarding of wines by Pickford & Co.:—

*Held*, that this order ought to be discharged, for that the evidence sought did not tend to prove bribery, though it might be useful in corroboration of direct evidence of bribery, and that it was not reasonable to require the admissions suggested, as the matters could not be within the defendant's own knowledge, and he could only obtain information about them by writing to rival tradesmen.

THE four plaintiffs and the defendant carried on business as wine and spirit merchants in partnership upon the terms of a partnership deed of December 6, 1879, modified by two subsequent deeds of May 16, 1882, and June 25, 1885. The term was forty years from January 1, 1880. The duty of travelling for the partnership was imposed on the plaintiffs; the defendant was to have the general management of the business, make all the purchases, and execute all orders obtained by the partnership. The defendant was entitled to two-sixth shares of the profits, the plaintiffs to one-sixth each.

C. A.  
1896  
EHRMANN  
v.  
EHRMANN.  
—

On June 13, 1894, the plaintiffs commenced this action for a dissolution of the partnership, alleging that the defendant had misconducted himself so that the firm was brought into discredit, and so that it was impossible for the plaintiffs to carry on the business in partnership with him, and that it had become just and equitable that the partnership should be dissolved. The statement of claim contained various allegations of different kinds of misconduct. The eighth paragraph was as follows:—

“The defendant bribed a person in the employ of Messrs. Pickford & Co., carriers, to inform him of the names and addresses of persons to whom such carriers forwarded wines on behalf of the Continental wine merchants, and sent to the plaintiffs lists of the names and addresses of such persons, and of the merchants by whom such wines were supplied to them, for the purpose of their being made use of by the plaintiffs in the course of their journeys on behalf of the firm. The plaintiffs when they received such lists did not know by what means they had been obtained by the defendant. The fact of the said bribery afterwards came to the knowledge of the plaintiffs, and also came to the knowledge of other persons, and injuriously affected the reputation of the firm.”

The plaintiffs were called upon to produce the lists mentioned in paragraph 8, but ultimately failed to produce them, and stated that they had not been preserved. Being called upon for particulars as to paragraph 8, they gave the name of the person whom they alleged to have been bribed, but stated that they did not know his address. This, however, it was stated, they had since discovered. They also furnished a list of names and addresses of German wine merchants whom they alleged to have forwarded parcels of wine through Pickford & Co. between 1883 and 1887 to persons in England whose names and addresses were given. These particulars were what the plaintiffs alleged to have been obtained by the defendant by means of the bribery. The books of Pickford & Co. for that period had been destroyed, so that Pickford & Co. could not give any information as to the correctness of these particulars.

The action having been set down for trial, the plaintiffs, on May 13, 1896, gave notice of motion that letters of request

might issue addressed to the proper tribunals in the Empire of Germany for the examination of the persons therein named (being German wine merchants referred to in the last preceding paragraph) as witnesses on behalf of the plaintiffs.

In support of this application Moritz Ehrmann, one of the plaintiffs, deposed that the persons whom it was proposed to examine were material and necessary witnesses on behalf of the plaintiffs with respect to the matters in question referred to in paragraph 8 of the statement of claim, and that the plaintiffs could not safely proceed to the trial of the issue raised by that paragraph without their evidence: "The said persons are some of the Continental wine merchants referred to in the said paragraph, and their evidence is required by the plaintiffs for the purpose of proving that certain wines were forwarded on their behalf to certain persons by Messrs. Pickford & Co. referred to in the pleadings."

Stirling J., who heard the motion on June 19, considered that the matter might probably be disposed of by the defendant making admissions as to the correctness of the particulars, and ordered letters of request to issue, but not before July 8, and the defendant was to be at liberty before that day to apply to stay the issue in the event of admissions being made by him.

The defendant appealed.

*Buckley, Q.C.*, and *H. Terrell*, for the appeal. This evidence is not sufficiently material to make a commission or letters of request proper. The charge is that somebody in Pickfords' employment was bribed to give information: the point of that is bribery. Now, the evidence sought for only goes to prove that certain foreign merchants at certain dates sent certain parcels of wine through Pickfords. That is not evidence of bribery. It may prove the truth of the lists which the defendants set out, and so may possibly be corroborative evidence in support of any direct evidence of bribery; but letters of request ought not to be granted for the purpose of obtaining evidence which does not go directly to the issue.

[They were then stopped by the Court.]

*Jelf, Q.C.*, and *Solomon*, for the plaintiffs. The sting of the

C. A.  
1896  
EHRMANN  
v.  
EHRMANN.

C. A.  
1896  
EHRMANN  
v.  
EHRMANN.

---

charge is the bribery ; but such a case is most difficult to prove, and corroboration is essential. If we do not prove the truth of the lists, we are left in a very helpless position. Pickfords' books are destroyed ; but if we can prove a list of people to whom Pickfords carried wine that is an important step in our case, for it proves that information must have been received from Pickfords. The evidence is evidence which it would certainly be right to produce if it could be obtained in England ; and as it cannot, letters of request should issue to obtain it abroad. The granting letters of request is to a great extent a matter of judicial discretion, though not so as to exclude an appeal, and the Court will not readily, in a matter which is to a great extent discretionary, differ from the conclusion at which a judge familiar with the case arrived. Stirling J. thought that unless the defendant admitted the lists the letters of request ought to go.

[LINDLEY L.J. How can the defendant make an admission as to matters which are not within his knowledge?]

Stirling J. considered that he could easily ascertain the truth of the lists by inquiring of the firms.

[LINDLEY L.J. I think you have no right to throw that burden upon him.]

LINDLEY L.J. I do not think it is possible to support this order. It is quite true that an order for a commission depends very much upon the discretion of the judge, and the circumstances must be very peculiar to induce the Court of Appeal to take a different view from that which the learned judge has taken about such a matter. Still we all know that the issuing a commission to take evidence abroad, or letters of request to a foreign Government to allow evidence to be taken, is a very serious matter—it involves great expense and delay, and ought never to be had recourse to unless it is really wanted for the purposes of the trial. The point to be looked to is whether the evidence which it is desired to obtain abroad is really necessary for the purposes of justice. It is not enough to say that possibly it may be of some use on some collateral matter—that it may be useful for the purpose of corroborating a witness, or some-



thing of that kind; it must have a closer bearing on the issue. Now, what is the issue here? This is an unfortunate partnership quarrel. The plaintiffs are in partnership with the defendant under articles by which the partnership is to last forty years. The plaintiffs allege that the defendant has so misconducted himself as to entitle them to a dissolution before the expiration of the forty years; and amongst other allegations of conduct discreditable on the part of a wine merchant and bringing the firm into discredit they allege in paragraph 8 of their statement of claim: [His Lordship here read that paragraph.]

The plaintiffs allege that the defendant has been guilty of discreditable conduct as a wine merchant. How is that to be proved? The discreditable conduct alleged is that the defendant bribed a person in Messrs. Pickford's employ here in England. The plaintiffs ask for a commission to prove—what? They ask for a commission to prove that certain Continental wine merchants did make consignments to people in this country through Messrs. Pickford somewhere between 1883 and 1887. Now, suppose they did prove that. I do not say that it may not possibly be corroborative evidence in support of direct evidence of bribery; but the evidence does not by itself tend directly to prove the charge. It is quite new to me that a commission should be granted for such a purpose. Stirling J. thought that the plaintiffs ought to have a commission unless the defendant will make admissions. What sort of admissions is he to make? Admissions that rival Continental wine merchants had consigned wine through Messrs. Pickford to some people in this country. How can the defendant know anything about it? It is a good ground for asking a person to make admissions if those admissions are with regard to something that he knows or can readily ascertain; but to expect a person in trade to make admissions as to what rivals in trade have done years ago appears to me to be a mistake. The learned judge took a view with regard to this matter which I cannot share; I do not think that to make these admissions was a reasonable term to impose upon the defendant, who knows nothing about the matter which he is asked to admit; and yet

C. A.

1896

EHRMANN

v.

EHRMANN.

Lindley L.J.

C. A.  
1896  
~  
EHRMANN  
v.  
EHRMANN.  
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unless he makes the admission the commission is to go. For what purpose? For the purpose which I have indicated, and no other. It appears to me that a commission is not necessary for the purposes of justice, and the order must be discharged with costs here and below, to be the defendant's costs in any event.

LOPES L.J. I am entirely of the same opinion. The analogy that Mr. Jelf sought to draw between evidence obtainable in this country and evidence that is only obtainable by the issue of a commission is altogether fallacious. There is a great deal of evidence which if easily obtainable in this country a learned counsel advising on evidence might be of opinion had better be given; but whether a commission ought to issue to obtain it abroad is an entirely different question. In my opinion, a commission to examine witnesses ought not to be lightly issued. I think that in order to justify the issue of a commission it ought to be clearly made out that the evidence abroad which it is sought to obtain is material, and directly material, to the case in hand—not merely evidence which incidentally might be useful, which is the description of the evidence sought to be obtained here. The evidence here sought is in fact sought, as was said by my learned brother Lindley in the course of the case, “for the purpose of bolstering up other evidence by incidental evidence.” That is not the kind of evidence that ought to be permitted to be obtained on commission. The learned judge has exercised his discretion with regard to this matter—and no doubt it is a matter of discretion—a discretion that we should not lightly interfere with. On the other hand, if we think the discretion has been wrongly exercised, it is our duty to interpose. After thinking the case carefully over, it strikes me in this way. I firmly believe that the learned judge would not have permitted these letters of request to go unless he had thought that the defendant might and ought to make certain admissions which he indicated. If there were certain admissions the defendant could and ought to have made, I am inclined to think that the judge would be right, and that if the defendant refused to make such admis-

sions the commission ought to go; but, to my mind, the admissions proposed were admissions that the defendant could not be reasonably asked to make. They were admissions in respect of matters about which he knew nothing, and about which he could only obtain information by writing to rival tradesmen, wine merchants abroad, asking them what consignments they made to customers in certain years long past. The answer he would receive would probably be something of this kind: "What business is it of yours?" I think, therefore, that the admissions were admissions which the defendant could not be reasonably asked to make, and that the learned judge was wrong in permitting these letters of request to go.

Solicitors for appellant: *Wild & Wild.*

Solicitors for plaintiffs: *Goldberg, Langdon, Barrett & Newall.*

H. C. J.

*In re* HAMILTON.  
CADOGAN *v.* FITZROY.

[1896 H. 3699.]

*Charity—Option to Invest on Government or Real Securities—Exercise of Option to Invest on Real Securities.*

The validity of a charitable gift by will is not affected by the trustees exercising an option to invest in real security.

A testatrix disposed separately of all such parts of her personal estate "as could not by law be devoted to charitable purposes." She then gave the residue of her personal estate to trustees upon trust to convert it into money, invest the proceeds on Government or real securities, pay the income to her daughter for life, and after her death to apply the capital for the benefit of certain charities. The trustees during the life of the tenant for life invested out of the pure personalty two sums of 350*l.* and 100*l.* in real securities, and they remained so invested at the death of the tenant for life:—

*Held*, by the Court of Appeal (reversing the decision of Kekewich J.), that the charitable gifts were not made pro tanto invalid by the investment in real securities.

*In re Corcoran* (62 L. J. (Ch.) 267) distinguished.

THIS was an appeal from an order of Kekewich J.

Harriet Hamilton, by her will, dated September 25, 1866,

C. A.

1896

EHRMANN

*v.*

EHRMANN.

Lopes L.J.

C. A.

1896

July 10.

C. A.  
1896  
*In re*  
HAMILTON.  
CADOGAN  
v.  
FITZROY.

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appointed her only child, Harriet Faulconer Hamilton, and George Woodcock executors and trustees thereof, and devised all her real estate to her trustees upon trust to raise by mortgage, sale, or otherwise a sum of 1000*l.* to be applied primarily and in exoneration of her general personal estate in paying her debts, funeral and testamentary expenses, the residue to be paid to her said daughter; and, subject thereto, she directed her trustees to permit her said daughter to receive the rents and profits of the real estate during her life for her separate use; and after the death of her said daughter she devised the said real estate to the said George Woodcock absolutely, expressing a wish that her or his heirs should sell the same and apply the money for certain purposes mainly charitable, with a declaration that this expression of her wishes should not impose on George Woodcock or his heirs any trust, obligation, or equity, nor derogate from the absolute gift to him. Then, after certain bequests of furniture and plate, the testatrix bequeathed to her said trustees and executors all mortgage debts and all such other parts of her personal estate as could not by law be devoted to charitable purposes upon trust for her daughter for life; and after her death for the said George Woodcock absolutely, with an expression of a wish that the capital should be applied in the same manner as her residuary estate, coupled with a declaration that this expression of wish should not impose on Woodcock, his executors or administrators, any trust, obligation, or equity. The testatrix then bequeathed to her trustees all the residue of her personal estate not thereinbefore disposed of, "upon trust, that the said trustees shall call in, sell, and convert the same into money and invest the net proceeds in Government or real securities, or in such other securities as the said trustees or trustee shall think proper, and shall pay the income of the said investments to my said daughter during her life for her separate use, and after her death shall, out of the capital, raise and pay all legacy duty then becoming payable, and also raise and pay to the said George Woodcock the sum of 100*l.*, free of legacy duty," and, subject thereto, upon the trusts following. Then, after a trust relating to certain specific chattels, she directed her trustees first to set apart a sum of Government stock sufficient



to produce, clear of all deductions, the annual income of 141*l.*, which she directed to be applied as a fund for providing certain scholarships for the pupils of the Royal Naval Female School at Isleworth (now called the Royal School for Naval and Marine Officers' Daughters); secondly, to invest for the benefit of the trustees for the time being at the Warneford Hospital, Leamington, the sum of 3000*l.* as therein mentioned; thirdly, to apply all the residue of her personal estate not thereinbefore disposed of in augmentation of the fund thereinbefore directed to be set apart to produce the annual income of 141*l.*

The testatrix died on April 4, 1877. At the date of her death her estate consisted solely of pure personal estate; but in 1878 and 1880 the trustees of the will, under the power of investment in the will, invested 350*l.* and 100*l.* respectively on mortgage of real estate, and such investments had not since been called in.

Harriet Faulconer Hamilton, the tenant for life under the will, died in December, 1894, and an originating summons was taken out by the existing trustees of the will to have it determined whether the residuary charitable bequests in remainder failed to the extent of the two sums of 350*l.* and 100*l.* by reason of those sums having been invested on mortgage of real estate. Kekewich J. held that the charitable bequests were invalid to the extent of those two sums, and that these sums belonged to the representatives of the testatrix's next of kin, and that the sum of 3000*l.* directed to be invested for the benefit of the Warneford Hospital and the ultimate residue of the testatrix's estate bequeathed to the Royal School abated rateably in the proportion which the said sums of 350*l.* and 100*l.* bore to the property still retaining the character of pure personalty, and that the sum directed to be set apart to produce the annual income of 141*l.* in favour of the Royal School should be set apart in full.

The trustees of the Royal School appealed against the first part of this judgment. The trustees of the Warneford Hospital appealed against the whole order.

*Dibdin*, for the appellants, the trustees of the Royal School.

C. A.

1896

*In re*

HAMILTON.

CADOGAN

*v.*

FITZROY.

C. A.  
 1896  
*In re*  
 HAMILTON.  
 CADOGAN  
*v.*  
 FITZROY.

Kekewich J. relied on and professed to follow *In re Corcoran*. (1) That case was very different from the present: the direction there was that the trustees should at the death of an annuitant transfer the testator's personal estate, "and the stocks, funds, and securities on which the same might then be invested, or so much and such parts thereof as might by law be so applied," to charitable purposes. This indicates an intention to treat the funds according to the state in which they might be at a future period, and to give to charity only such parts of the estate as were then invested on investments which could be given to a charity. I do not object to the decision, though I should question some of the dicta; none of the cases applicable to them were cited. I submit that the trustees are trustees for the charities as well as for the tenant for life, and they must so exercise their power as not to defeat the trust. The observation of Lord Hardwicke, cited by Sir W. Grant in *Curtis v. Hutton* (2), almost settles the point: "The option to lay out the fund in land cannot arise on account of the statute." So in *Grimmett v. Grimmett* (3) a gift to a charity was supported on the ground that the trustees had an option to invest in pure personalty.

[He was stopped by the Court.]

*J. W. Baines*, for the trustees of the Warneford Hospital, referred to *Sorresby v. Hollins*. (4)

*Carson*, for the next of kin. The appellants do not dispute that under the old law which governs this case a mortgage could not be bequeathed to a charity. The testatrix here in fact tells us that she knows that mortgages cannot be given to charities, and then she proceeds to give the trustees power to invest on Government or real securities. The investment which was made was one directly authorized by the will. *In re Corcoran* (1) is directly in support of the view that the charity cannot take the mortgages; and in *Re Beaumont's Trusts* (5) Lord Romilly clearly was of opinion that the exercise of the option by the trustees would settle whether the charity could take or not.

(1) 62 L. J. (Ch.) 267; 67 L. T. (N.S.) 754.

(2) 14 Ves. 537, 539.

(3) Amb. 210.

(4) 9 Mod. 221.

(5) 32 Beav. 191.

In *Swann v. Fonnereau* (1) Lord Alvanley observes that in the cases where a charitable gift had been upheld by reason of the trustees having an option, the trustees had exercised no option to make the fund savour of realty. *Carter v. Green* (2) and *University of London v. Yarrow* (3) were of the same character. The trustees of the charities to which the fund was bequeathed had an option as to investment; the gifts were upheld; but Lord Hatherley inserted a declaration that the trustees must not apply the money in the purchase of land; Lord Romilly left them to act at their own risk; but in each case it was implied that the charity could not take what savoured of realty.

*Benn*, for the trustees of the will.

*Dibdin*, in reply.

[*Lewis v. Allenby* (4) was referred to.]

[LINDLEY L.J. Do you say that the mortgages ought to be transferred to you?]

No; the money ought to be called in. If the Court decides in my favour the trustees are trustees for us, and we can compel them to call in the money.

LINDLEY L.J. This is an appeal from a decision of Kekewich J. declaring that the residuary bequest in remainder in favour of the trustees of the Royal School and the trustees of the Warneford Hospital contained in the will of the testatrix, Harriet Hamilton, has failed so far as regards the two sums of 350*l.* and 100*l.* which were invested on mortgage of real estate during the lifetime of Harriet Faulconer Hamilton, the tenant for life thereof, which mortgage investments still continue.

The question is whether this declaration is right. That depends on the will, and to some extent upon what has taken place since the death of the testatrix. The will requires to be examined with care. The testatrix first disposes of her real estate, and then gives to her trustees all such parts of her personal estate as could not by law be devoted to charitable purposes upon trust for her daughter for life, and after her death for George

C. A.

1896

In re

HAMILTON.

CADOGAN

v.

FITZROY.

(1) 3 Ves. 41, 50.

(3) 24 Beav. 472.

(2) 3 K. &amp; J. 591.

(4) L. R. 10 Eq. 668.

C. A.  
 1896  
In re  
 HAMILTON.  
 CADOGAN  
 v.  
 FITZROY.  
 Lindley L.J.

Woodcock absolutely. I merely refer to this to shew that her residuary gift comprised only pure personalty. She gives the residue to trustees upon trust for her daughter for life, and after her death for charities. The trustees had power given them to invest on Government or real securities. They therefore had power to invest on mortgage; and during the lifetime of the tenant for life they did invest two sums of 350*l.* and 100*l.* on mortgages of real estate which have not been called in. The question is whether, these investments having been made and not called in, the gift to the charities fails *pro tanto*.

In determining this question we must bear in mind that if a testator gives his trustees an option whether they will invest on real or on pure personal securities, and then devotes the property to charity, you cannot at his death say that this disposition in favour of charity is illegal: *Curtis v. Hutton* (1); Tudor on Charitable Trusts, 3rd ed. p. 413. In the next place, we must bear in mind that there is a presumption against a testator leaving to his trustees a discretion whether the trusts declared by his will shall take effect or not. I cannot spell, out of a discretion as to the mode of investment, an intention to give the trustees a power to say that the persons intended by the will to be benefited shall not take at all. The testatrix, after disposing of her land and of her impure personal estate, bequeaths to trustees "all the residue of my personal estate not hereinbefore disposed of," i.e., her pure personal estate, upon the trusts therein mentioned. [His Lordship here read the trusts.] There is then a distinct gift of pure personal estate for the benefit of these charities, and it is not conceivable that the gift of it to the charities should be defeated because the trustees have made an interim investment of it on real security. Care is taken to give the charities nothing but pure personal estate; and are all the dispositions in their favour to be void because at the death of the tenant for life the money was partly invested on mortgage? The point is new. Kekewich J. has held that so far as the money was invested on mortgage the gifts to the charities failed, and he relied on *In re Corcoran*. (2) There are passages in the judgment in that case which if not read carefully help

(1) 14 Ves. 537.

(2) 62 L. J. (Ch.) 267.



the respondents; but I do not think they were meant in the general sense in which they have been taken, for the learned judge had before him a will which referred distinctly to the state of the fund at a future period, and his observations must be read with reference to that. Perhaps the strongest is this (1): "Then supposing it" (the gift) "had been this, 'I give my pure personal estate to trustees, upon trust to invest it as they please on the purchase or mortgage of land, or on pure personal security, and transfer the property so acquired to charity trustees,' in my opinion, in that case the trustees would have had a discretion to exercise which might have the effect of enabling it to go to charity trustees, or might have prevented it; and if the trustees had exercised their power *bonâ fide* in the exercise of their discretion, the charity trustees would or would not have taken, according to the result." That must be read with reference to the case he had before him, where the testator referred to the state in which the property should be found at a future time. The learned judge who decided *In re Corcoran* (2) never meant to say that in a case like the present it depended on the discretion of the trustees what the charities should take; and it would go beyond any authority or the principle of any authority to decide so in the present case. The appeal must be allowed, and a declaration made that the charitable gifts are not invalid to the extent of the two sums in question.

C. A.  
1896  
*In re*  
HAMILTON.  
CADOGAN  
v.  
FITZROY.  
Lindley L.J.

LOPES L.J. I am of the same opinion. The learned judge has held that the disposition of the residue of pure personalty in favour of charities is void so far as relates to two sums which have been invested on mortgage. We must look at the will itself, speaking as it does from the death of the testatrix, to determine whether a bequest in it is valid. Now there is clear authority for the proposition that a gift of pure personalty to a charity is not void *ab initio* where the trustees have an option whether they will invest on securities savouring of realty or not. There is, therefore, nothing in the will to make the bequest invalid. It is true that the trustees have power to invest on real securities; but does their investing part of the

(1) 62 L. J. (Ch.) 269.

(2) 62 L. J. (Ch.) 267.

C. A.  
1896  
        
*In re*  
HAMILTON.  
CADOGAN  
*v.*  
FITZROY.  
        
Lopes L.J.

fund on mortgage make the gift to the charities pro tanto void? I think it does not. The mortgages might have been called in, and they must be looked upon as only a temporary investment of part of the fund. The testatrix never intended to give the trustees power to defeat her charitable gift. She took care only to give pure personalty to the charities, and was anxious to make the gift to them effective; but Mr. Carson's construction gives the trustees power to defeat that gift altogether. The case would have been different if we had found in the will any clause dealing with the investments as they stood at a particular future time, as in *In re Corcoran* (1); but there is nothing of the kind in this will. The testatrix deals with the whole fund as being pure personalty throughout.

RIGBY L.J. I am of the same opinion. The testatrix has carefully separated her pure and impure personalty, and provided for only pure personalty being given to charities. It is clear that not a single direction in the will can be said to violate the law. The option given to the trustees to invest on real securities as distinguished from a direction to do so does not invalidate the charitable gift. If the Court had been called upon at the death of the testatrix to say whether the charitable gifts were good or bad, it must have said that they were good. I cannot gather from the will any intention that the trustees should have power to interfere with the beneficial interests—in fact, a totally different intention clearly appears.

In numerous cases it has been decided that an option to invest in real securities does not affect the validity of a charitable gift. If the trustees exercise that option and invest in real securities, does that affect its validity? I think not. As regards *In re Corcoran* (1), the only gift there consisted in a direction to transfer securities as they stood on a certain day. It was like a gift of securities mentioned in a schedule. If the testatrix had given the securities in a schedule, some of them might be securities which could not be given to a charity, and as to them the gift would fail. Every word in the judgment is referable to that, and, however general the expressions of the

(1) 62 L. J. (Ch.) 267.

learned judge may have been, they must be construed with reference to that. In the case of *Re Beaumont's Trusts* (1) there was a gift by a testatrix to a tenant for life, and after her death to another person absolutely, the trustees having a discretion to invest on Government or real securities. The legatee in remainder had no control over the investment of the property: it depended upon the action of the trustees whether she should take it in the form of pure or mixed personalty; she could only take it as she found it; and it would depend on the action of the trustees to what extent her bequest of it to a charity could take effect. It is remarkable that no authority has ever touched upon the point whether an option of this kind gave the trustees power to defeat a charitable bequest. A trust to invest does not usually affect the beneficial interests of the cestuis que trust, and if the Court were administering an estate, no investment which it might direct would alter the beneficial rights. The appeal must be allowed.

Solicitors for Royal School and the trustees of the will: *Bridges, Sawtell & Co.*

Solicitors for Warneford Hospital: *Field, Roscoe & Co., for Field & Sons, Leamington.*

Solicitors for next of kin: *Warren, Murton & Miller, for Woodcock & Co., Coventry.*

(1) 32 Beav. 191.

C. A.

1896

KEKEWICH

J.

March 4.

C. A.

June 23, 24,

25;

July 22.

## HOW v. EARL WINTERTON.

[1895 H. 2430.]

*Trustee—Breach of Trust—Breach of Duty—Omission to form Fund for Annuity—Action by Annuitant against Trustee for Account—Right of Action—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1, clauses (a) and (b)—Carrying back Account—Statutes of Limitations.*

The effect of s. 8 of the Trustee Act, 1888, is that except in the three following cases, fraud by the trustee, retention of trust property by him, or receipt by him and conversion of it to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions or proceedings for breaches of trust were enumerated in them.

Under a will, the plaintiff, on the expiration of a term of fourteen years from the death of the testatrix (who died on May 20, 1875), became entitled to an annuity for her life. During the term it was the duty of the defendant, as trustee under the will, to receive the rents of certain devised estates, and after payment of some immediate annuities, to accumulate the surplus rents and invest the accumulations in the purchase of lands. The plaintiff's annuity was charged upon the accumulations and the lands to be purchased therewith, as well as upon the devised estates. Without any fraudulent intent the defendant, instead of accumulating the surplus rents, applied them in keeping down interest on incumbrances and in necessary repairs.

The term expired on May 20, 1889, the plaintiff's annuity fell into arrear in November, 1894, and on August 9, 1895, she brought this action for an account.

The defendant had no trust moneys in his hands at the issue of the writ, and had never converted any trust moneys to his own use; and he relied on s. 8 of the Trustee Act, 1888, but admitted that within six years before the issue of the writ he had rents in his hands which he ought to have accumulated and invested:—

*Held*, (1.) that the plaintiff was entitled to an account of the moneys in the hands of the defendant six years before the issue of the writ and liable to the trust for accumulation, and also to an account of the rents which ought afterwards to have been accumulated, but not to an account from the death of the testatrix; and (2.) that the case fell either within clause (a) or clause (b) of s. 8 of the Act of 1888, but (*per* Rigby L.J.) preferably within clause (a); and that whichever clause was applicable, the defendant was protected from demands more than six years before the issue of the writ.

The decision of Kekewich J. affirmed.

Sect. 8 of the Trustee Act, 1888, discussed and explained.

*In re Bowden* (45 Ch. D. 444) observed upon.

## APPEAL from Kekewich J.

Mary Rabett, widow, by her will dated November 19, 1874, devised her real estate to the use of two trustees, one of whom



was the defendant, Earl Winterton, upon trust during a term of fourteen years from the death of the testatrix to pay out of the rents and profits certain annuities, and to lay out the surplus of the said rents and profits in the purchase of real estate to be conveyed to and upon the like uses and trusts, and in the meantime to invest the same and apply the income in the same manner as the said rents and profits were thereinbefore directed to be applied, so as to form an accumulating fund in the nature of compound interest. And after the expiration of the said term of fourteen years the testatrix gave to the plaintiff, Louisa Charlotte Augusta How, widow, an annuity or yearly rent-charge of 50*l.* during her life, payable half-yearly; and the testatrix charged this annuity on all her real estate.

The testatrix died on May 20, 1875, seised of considerable estates in the county of Suffolk, which were subject to various mortgages.

The period of fourteen years referred to in the will expired on May 20, 1889. During the whole of that period the defendant, Earl Winterton, was in receipt of the rents and profits of the real estate, his co-trustee having disclaimed the trusts of the will.

The plaintiff alleged that the rents and profits during the said fourteen years were more than sufficient to keep down the interest on the incumbrances, to pay the necessary outgoings, and to discharge the annuities; but that the defendant, in breach of his duty, wholly neglected to lay out and invest the surplus rents and profits as directed by the will, and that no part of such surplus rents and profits had ever been in fact accumulated, or invested, or otherwise made available as a security for the plaintiff's annuity; also that, in consequence of certain foreclosure proceedings by the mortgagees of the estates, and of the default and neglect of the defendant, there was no estate now available for satisfying the plaintiff's annuity, and that the plaintiff had in fact been deprived of her annuity since November, 1894.

The plaintiff accordingly, on August 9, 1895, issued the writ in this action against Earl Winterton, as sole trustee of the will, claiming (1.) an account of the rents and profits received

C. A.  
1896  
How  
v.  
EARL  
WINTERTON.

C. A.  
1896  
How  
v.  
EARL  
WINTERTON.

by the defendant, or by any other person or persons by his order or to his use, during the fourteen years; (2.) a declaration that the defendant was liable to make good to the estate of the testatrix the difference between the rents and profits so received and the moneys properly expended, together with compound interest on such difference at 5 per cent. per annum from the respective dates when the amounts making up such difference were respectively so received, with half-yearly rests; (3.) an account of what was due from the defendant on the footing of such declaration; and (4.) a declaration that the plaintiff's annuity was charged upon the amount so certified to be due from the defendant.

The plaintiff delivered a statement of claim alleging to the effect above stated. In his statement of defence the defendant denied that the rents and profits during the fourteen years were more than sufficient to keep down the interest on the incumbrances, to pay necessary outgoings, and to discharge the annuities payable thereout; or that he had ever been guilty of any such breach of duty or neglect as alleged by the plaintiff. He also insisted that the plaintiff's right to any of the accounts or declarations claimed was barred by s. 8 of the Trustee Act, 1888; and further, that if the defendant had been, during the fourteen years, guilty of any breach of trust whereby any part of the rents and profits was applied or expended for any purpose not authorized by the trusts of the will, the plaintiff's right (if any) now to call upon the defendant to repair any such breach of trust was also barred by the same statute.

In her reply the plaintiff alleged that the defendant had, within a period of six years before action brought, received moneys on account of arrears of rents and profits which accrued during the fourteen years, which moneys were applicable for the purpose of answering the plaintiff's annuity; and that this fact, and the fact of the sufficiency of the rents and profits during the fourteen years to pay interest on incumbrances, outgoings and annuities, were not known to the plaintiff until November, 1894.

The action came on for trial on March 4, 1896.

The first question argued was merely one of construction—as

to whether the annuity was charged not only on the real estate, which was in the possession of mortgagees, but also on the rents and profits directed to be accumulated and laid out in the purchase of land. Upon that Kekewich J. held that the annuity was charged upon the accumulations of rents and profits as well as on the real estate.

It was admitted on behalf of the defendant at the bar that on August 9, 1889, that is, six years before the issue of the writ, there were moneys in his hands liable to the trust for accumulation. The question was then argued whether the plaintiff's right of action was barred by s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59). (1)

*Micklem*, for the plaintiff.

*Bramwell Davis*, Q.C., and *Godefroi*, for the defendant. We rely upon the protection given by s. 8 of the Trustee Act, 1888, for the defendant's right is not affected by any of the exceptions in that section, that is to say, he has not been party or privy to any fraud or fraudulent breach of trust, nor converted any part of the trust property to his own use, nor retained any part of it: *In re Page*. (2) That the defendant has been guilty of a fraudulent breach of trust, or has converted any of the trust

C. A.  
1896  
How  
v.  
EARL  
WINTERTON.

(1) Sect. 8 is, so far as is material, as follows:—

“(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:

“(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not

been a trustee or person claiming through him:

“(b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute . . . shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.”

(2) [1893] 1 Ch. 304.

C. A.  
1896  
How  
v.  
EARL  
WINTERTON.

property to his own use, is not suggested; nor is any trust property "still retained" by him. Although he has received rents within the six years before action brought, he has not any moneys in his hands now, nor has the plaintiff pleaded that he has. Accordingly, as none of the exceptions apply, the action fails.

*Micklem*, in reply. We have pleaded that rents and profits available for this annuity, and beyond what was required for the interest on the mortgages, were received by the defendant, and that is sufficient; for a trustee who has received trust moneys must be deemed to have "retained" them within the exception in s. 8 until he has duly accounted for their payment. Our view is that the defendant has made wrongful payments; and if that is so—and we desire to have an account in order to ascertain this—he cannot set up the statute as a defence to them: *In re Hyatt* (1); *In re Marsden*. (2) In *In re Page* (3), where the action was for administration, the statute was obviously an answer, unless it could have been shewn that the defendant had money in his hands; but where, as here, the action is merely for an account, it is no answer for trustees who have had trust moneys in their hands to say, "More than six years ago we parted with the moneys." Here our right of action did not begin until last year. A mere right of action is not barred by the statute. [He referred to *In re Hargreaves* (4) as to the right of trustees for an annuitant to sue for administration as creditors.]

KEKEWICH J. This case raises two extremely important questions, one being somewhat technical and the other more substantial. The Trustee Act, 1888, s. 8, is not to be applied at all to the cases excepted in the first sub-section of that section, that is to say, where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy (which is clearly not the case here, nor is it suggested), or where the claim "is to recover trust property, or the proceeds thereof still retained by the trustee, or pre-

(1) 38 Ch. D. 609.

(3) [1893] 1 Ch. 304.

(2) 26 Ch. D. 783.

(4) 44 Ch. D. 236.



viously received by the trustee and converted to his use." Now, the first point I have to consider is whether, on the pleadings as they stand, or on any amendment that can properly be made, it can be said that there is money, or proceeds of property in any shape or form, still retained by the trustee, or received and converted by the trustee to his own use. What Mr. Micklem proposes to prove is that at the end of the term there was in the hands of the trustee a considerable sum, part of which he might have disposed of more than six years before the issue of the writ, but some of which still remained in his hands after the issue of the writ. That is entirely a question of evidence. He also proposes to prove that moneys had been received within the six years, and that the trustee is liable for that. That is a question of evidence, and upon that of course I must not trench. As at present advised, it seems to me that Mr. Micklem is entitled to an account upon that footing. But he wishes to go further, and he says that money which was, at some time or other, received by the trustee but was parted with by him for an improper purpose—that is to say, where he has committed breaches of trust, and where he has done so six years before the issue of the writ—is to be treated, for the purposes of this 8th section, as trust property "still retained by the trustee," that is, retained at the date of the issue of the writ, so as not to come within the exception. As regards that, I am against him. I do not think that the statement of claim, when properly read, raises that question; and seeing that the reply was delivered, of course after the statute had been pleaded, and that it only alleges that moneys which the defendant had received within a period of six years before action brought are applicable for the purposes of answering the plaintiff's annuity, it appears to me that he has not pleaded that there are moneys now in his hands, or were so at the date of the writ, in the sense of still being retained by the trustee. Mr. Micklem has stated frankly what he proposes to prove on taking the account. He does not propose to prove that moneys were actually in the hands of the trustee or retained by him at the date of the writ. So far, therefore, I am clear that the case is not within the exceptions; and, therefore, if the statute

C. A.  
1896  
How  
v.  
EARL  
WINTERTON.  
Kekewich J.

C. A. is otherwise applicable, it is applicable notwithstanding that  
1896 argument.

How Then, is the statute applicable? If it is, then it is so by reason  
v. of sub-s. 1(b). This is an action brought by Mrs. How to recover  
EARL trust property. It is an action for account, and necessarily so.  
WINTERTON. She is an annuitant whose annuity was paid up until November,  
Kekewich J. 1894, and the form of her action must necessarily be to insist  
upon the trustee rendering an account of what he has received,  
of what he ought to have received and has not, and of what,  
having been received, has not been properly dealt with by him,  
and to make him liable accordingly; an account being taken  
year by year in order to see how far the annuity had been paid  
and how far it ought to have been paid. Mr. Micklem's point  
is this: that if on taking that account he shews that the trustee  
received, say, 1000*l.* at any time, he must account for that; and  
that it is no answer to say that, at some point of time more than  
six years before action brought, that money has been parted  
with. When I use the expression "parted with" all I mean is,  
parted with by breach of trust. It is not a question of the  
trustee having converted the money to his own use, because  
then it would be excepted; nor of his having committed a fraudulent  
act, for that again would be excepted. I will take the case  
suggested by Mr. Micklem. Suppose the trustee, being the  
owner of this land, had subscribed to a parochial charity out of  
the money which he ought to have kept for the annuity, or had  
handed the money directly over to the rector of the parish, that  
would have been a breach of trust. Such a breach of trust  
constitutes a simple contract debt to which no Statute of  
Limitations applied before 1888, because no statute applied  
to breaches of trust. But the Legislature has intervened and  
said that the old rule of equity is wrong, and that a trustee is  
entitled to be protected as much as any other person who owes  
money, except where he has committed an act of fraud or has  
put trust money into his own pocket. If he has not done  
anything of that kind, a trustee who has parted with money  
and is therefore a debtor is as much entitled to protection as  
any other person. In my opinion I should be repealing the  
statute, or depriving the statute of a very large part of its

remedial benefit, if I were to hold that it is not to be applied in that way.

Mr. Micklem urges that the result is that a trustee against whom an account has been ordered to be taken may go into chambers and say, "True, I had the money: true, I spent it in an improper manner and it ought to be here available for you, and it is by my own default that it is not forthcoming; but, as that happened six years ago, you cannot claim it"—that is to say, he may claim to set up the statute in order to shield himself from the consequence of his own wrongdoing, speaking of it, of course, as a legal act and not as a moral wrong. That seems to me to be precisely what the statute says he may do. Although some one may be debarred from a righteous remedy, and although some one may go scot-free where strict justice would require him to pay money that he owes, still, on the whole, it is for the benefit of the public that actions against trustees for innocent breaches of trust should be put an end to. That is the principle, as it seems to me. I cannot see that it is right to stop short of applying that principle here merely because this is an action for account and not an action simply to recover a certain sum of money. Therefore, an account must be taken, with a special direction to the chief clerk that, as to any moneys proved to have been parted with before six years from the issue of the writ, the statute will be applicable.

G. I. F. C.

The defendant appealed; and the plaintiff gave a cross-notice to vary the judgment, asking for an account from the death of the testatrix in May, 1875; and she further sought to charge the defendant with compound interest at 5 per cent. on all the balances of rents received by him and not properly invested and accumulated.

The appeal came on for hearing on June 23, 1896.

*Bramwell Davis, Q.C.*, and *Godefroi*, for the defendant, in support of his appeal, used substantially the same arguments as in the Court below, contending (1.) that the case was not within either of the exceptions specified in s. 8 of the Trustee

C. A.

1896

How

v.

EARL  
WINTERTON.

Kekewich J.

C. A. Act, 1888, that the defendant was entitled to all the protection  
 1896 afforded by that Act, and that the plaintiff's right to any account,  
 ~~~~~ declaration, or relief was barred by the statutes; and (2.) that  
 HOW if the plaintiff was entitled to any relief it must be limited
 v. if the plaintiff was entitled to any relief it must be limited
 EARL to the period of six years before the commencement of the
 WINTERTON. action.

[They referred to the cases cited below, and also to *Thomas v. Sylvester*. (1)]

Micklem, for the plaintiff, as respondent to the defendant's appeal, and in support of the plaintiff's cross-notice to vary. The statute of 1888 has no application to a case of this kind. This is in effect an action against a trustee to recover trust property still retained by him within the second of the exceptions to the section, and the account ought to be carried back to the death of the testatrix on May 20, 1875, because the amount which the defendant had or ought to have had in his hands on August 20, 1889, cannot be ascertained without taking the account from that date. A trustee who receives trust moneys must be treated as having them still in his hands, unless and until he can account for their proper application. The fund I claim is my fund in my trustee's hands, and he cannot answer any claim by calling in aid the statute of 1888.

[RIGBY L.J. referred to *Thorne v. Heard*. (2)]

The statute did not begin to run against the annuitant in this case until November, 1895, when her annuity ceased to be paid. She could, no doubt, have brought an action to administer the trust many years before her interest accrued in possession, but she was not bound to do so. She had no reason to suppose that her annuity would not be paid, and anticipated danger does not entitle an annuitant to sue unless there are arrears of the annuity. An annuity is a series of recurring payments, and each non-payment gives a separate right of action. So here there is cause of action constantly arising; and a continuing account with receipts and payments of this character cannot be limited to a period of six years. Being entitled to an account, the plaintiff is entitled to evidence of proper payments. An order limited to six years gives a relief to the plaintiff which is

(1) L. R. 8 Q. B. 368.

(2) [1894] 1 Ch. 599; [1895] A. C. 495, 503.

obviously inadequate. The defendant cannot set up a wrongful payment and say that the plaintiff must not inquire into it. If s. 8 of the Act of 1888 is applicable, the case falls within clause (a), and not within clause (b); and if so the account must be carried back to the death of the testatrix. [He also cited *In re Hyatt* (1), and made use of the arguments already reported in the Court below.]

Bramwell Davis, Q.C., in reply.

THE COURT (Lindley, Lopes and Rigby L.JJ.), affirming the judgment of Kekewich J., held that the plaintiff was entitled to an account of the moneys in the hands of the defendant on August 9, 1889, i.e., six years before the issue of the writ in this action, and also to an account of the rents and profits subsequently received by the defendant which ought to have been invested by him. And their Lordships accordingly dismissed the defendant's appeal; but as to the cross-notice to vary the judgment of Kekewich J. given by the plaintiff, their Lordships reserved judgment.

July 22. LINDLEY L.J. now delivered judgment as follows :—The question raised by the plaintiff's cross-notice turns on s. 8 of the Trustee Act, 1888. In order to appreciate the question a short statement of the facts which give rise to it is necessary. Under a will, which came into operation in May, 1875, the plaintiff became entitled on May 20, 1889, to an annuity of 50*l.* a year for her life. This annuity was charged on certain lands of which the defendant became sole trustee. Under the trusts of the will it was his duty as trustee for a term of fourteen years, which expired on May 20, 1889, to receive the rents, to pay some annuities out of them, and to invest the surplus rents in the purchase of real estate, and until such purchase to invest and accumulate those rents at compound interest. The plaintiff's annuity was charged on the land thus to be bought and on the fund to be accumulated in order to buy it, as well as on the lands devised to the defendant in trust for other people, as already stated.

C. A.
1896
~~~~~  
HOW  
v.  
EARL  
WINTERTON.

C. A.  
1896  
How  
v.  
EARL  
WINTERTON.  
Lindley L.J.

The annuity was paid, although not regularly, from the time it became due up to 1895 by the persons beneficially entitled to the real estate on which it was charged. But in that year prior mortgagees intervened, and the plaintiff's annuity ceased to be paid. On August 9, 1895, she issued this writ against the defendant as trustee, asking in substance for an account of the rents which he ought to have accumulated, and seeking to make him responsible for any deficiency in the fund which, if he had accumulated the surplus rents properly, would be now available for the payment of her annuity.

It has been decided, first by Kekewich J., and again by this Court on appeal by the trustee, that the plaintiff is entitled to an account of the moneys in the hands of the trustee on August 9, 1889 (i.e., six years before the commencement of this action), and liable to the trusts for accumulation under the will, and also to an account of the rents and profits subsequently received by the trustee which ought to have been accumulated. But the plaintiff is not content with this, and by her cross-notice she asks for an account from the death of the testatrix in May, 1875, and the plaintiff further seeks to charge the defendant with compound interest at 5 per cent. on all the balances of rents received by him and not properly invested and accumulated.

It appears that the defendant has acted perfectly honestly throughout; he did not understand that the annuity was a charge on the rents directed to be accumulated, and, instead of accumulating the surplus rents, he applied what ought to have been accumulated in keeping down interest on incumbrances and in necessary repairs.

The defendant relies on s. 8 of the Trustee Act, 1888, as an answer to the plaintiff's present demand. [His Lordship then read that section, and continued :—]

There is no fraud or fraudulent breach of trust to which the trustee is party or privy. The defendant had no trust money in his hands or under his control at the time of the commencement of the action, nor is it suggested that the defendant has converted to his own use any trust money previously received by him. This action, therefore, is not one of those which are

excepted from the operation of clauses (a) and (b) of s. 8 of the Trustee Act, 1888.

Before considering the application of those clauses to this case, it is necessary to ascertain the true nature of the plaintiff's cause of action, and when that cause of action accrued. The breaches of trust of which the plaintiff complains are a series of omissions on the part of the trustee, during fourteen years prior to May 20, 1889, to form a fund for the payment in case of need of her annuity. It has been decided that his duty in this respect did not terminate at the end of the term on May 20, 1889, so as to exonerate him from all liability in respect of rents which became payable to him before that date, although they were not in fact paid to him until afterwards. He was bound to accumulate those rents as if he had received them when they became due. They were as much subject to the trusts of the term as the rents which were paid to him during its continuance. Each time the defendant failed to invest what he ought to have invested he committed a breach of trust in respect of which the plaintiff might have sued him. A series of separate causes of action thus arose, each breach of trust giving her a fresh cause of action.

But her annuity did not begin until the end of the term, namely, on May 20, 1889. Until that day she was rather in the position of a person entitled in remainder than in the position of a person entitled in possession. Although she might have sued the trustee before her interest accrued in possession, she was not bound to do so. For the purposes of the Statutes of Limitation, therefore, her causes of action cannot be regarded as having first accrued before May 20, 1889. Even then she could not have sued for her annuity. Her annuity commenced to run from that time; but no payment in respect of it became due to her until six months afterwards—namely, November 20, 1889. She could not have sued for payment of any arrears of her annuity until that date. Her right, however, to sue for arrears is one thing, her right to sue her trustee for prior breaches of trust is another thing, and although her right to sue for arrears did not accrue till November, 1889, her right to sue for the previous breaches of trust

C. A.

1896

How

v.

EARL

WINTERTON.

Lindley L.J.

C. A.  
 1896  
 ~~~~~  
 How
 v.
 EARL
 WINTERTON.

 Lindley L.J.

accrued six months earlier. In this particular case nothing really turns on this point, for the defendant has admitted that, within six years next before the issuing of the writ in this action, he had rents in his hands which he ought to have invested and accumulated; and there is reason to suppose that he has received some more since. *Thorne v. Heard* (1) shews that he cannot be treated as if he still retained these moneys so as to deprive him of the benefit of s. 8 of the Trustee Act, 1888; but neither that nor any other statute protects him from liability to account for breaches of trust committed by him within the six years next before the commencement of this action. The writ was issued on August 9, 1895, and the account which has been directed is confined to that period.

With these preliminary observations, I pass to clauses (a) and (b) of s. 8 of the Trustee Act, 1888, on which the question to be decided ultimately depends. It was strenuously contended on behalf of the plaintiff that this case fell within clause (a) of s. 8 and not within clause (b), and further that, if it fell within clause (a), the account must be carried back to the death of the testatrix. I have some doubt as to the first of these views: but even if the first is right, the second is, in my opinion, quite untenable. Clause (a) requires an answer to the question, What action or proceeding, if any, could the plaintiff have brought against the defendant in respect of the accounts complained of if he had not been her trustee? In *In re Bowden* (2) Fry L.J. said, with reference to this clause, "If a person had not been a trustee, he could not be sued for a breach of trust; and there is no right or privilege, that I am aware of, conferred by any statute of limitations in respect of a breach of trust. Therefore, I should have great difficulty in applying that sub-section to the present case." The case before the Lord Justice was an action by a new trustee against an old trustee to compel him to make good trust funds which he had misapplied. The Lord Justice was right in saying that no action or other proceeding could be taken by such a plaintiff against such a defendant if there had been no trust. But, although I share with Fry L.J. the difficulty presented by clause (a), I cannot avoid the con-

(1) [1895] A. C. 495.

(2) 45 Ch. D. 450-1.

clusion that to exclude the operation of clause (a) in all cases on the short ground stated by him would be really to deprive clause (a) of all meaning whatever. I cannot think that Fry L.J. intended to go so far as that. The Legislature appears to have assumed that there might be cases in which, if there were no trust, some action or proceeding might be taken by the plaintiff against the defendant, and to which some Statute of Limitations would be a defence. It is necessary, therefore, to proceed to inquire what action or proceeding, if any, could have been taken in such a case as this, if there had been no trust.

First, I will take actions at law. An action on an implied promise, or an action on the case for a breach of duty, is the only action or proceeding which occurs to me as capable of being maintained under the circumstances supposed. But six years are a bar to any such actions as those. A common law action of account only lay to recover a balance claimed by the plaintiff, and which on taking an account he said would be found payable by the defendant to him. (See Comyns' Digest, "Accompt," which shews how limited the scope of such an action was.) A common law action of account clearly would not be applicable to such a case as this. I will now turn to equity. An account in equity, excluding all trust, would have no equitable element in it. It would be based on legal, and not equitable, rights; it would afford better machinery than an action at law, because of the discovery which could be enforced in it, but that is all. To any such action the Statute of Limitations would be as much a bar in equity as at law: see *Foley v. Hill* (1) and *Knox v. Gye*. (2) But, assuming that the plaintiff could have sued the defendant in equity for an account, if there had been no trust, to what claims could such an account extend? Clause (a) of s. 8 of the Trustee Act, 1888, if it applies to trustees' accounts at all, assumes that some Statute of Limitations would be applicable, and puts trustees' accounts on the same footing as other accounts to which the Statutes of Limitations apply. Under the Statute of James I., as amended, first by Lord Tenterden's Act (9 Geo. 4, c. 14), and afterwards

C. A.
1896
How
P.
EARL
WINTERTON.
Lindley L.J.

(1) 1 Ph. 399.

(2) L. R. 5 H. L. 656.

C. A. by s. 9 of the Mercantile Law Amendment Act (19 & 20 Vict.
 1896 c. 97), no claim could be made in respect of matters more than
 How six years old. This is plain from the language of the last
 v. enactment, and was one of the points decided in *Knox v. Gye*. (1)
 EARL As Lord Westbury in that case said (2), the statute forbids any
 WINTERTON. claim in respect of a matter more than six years before action.
 Lindley L.J. This I take to be the law applicable to all cases which can be
 brought within clause (a) of s. 8 of the Trustee Act, 1888.

In the present case the action is maintainable in respect of the defendant's receipts since August 9, 1889, and in respect of rents then in his hands which he ought to have accumulated. It is said that the amount of what he then had cannot be ascertained without taking an account from the death of the testatrix. This, however, is not so. What the defendant had in his hands in 1889 can be ascertained by an inquiry. It is a mere question of fact to be ascertained by evidence, and in particular by the examination of the defendant on oath, and the production of his earlier accounts, which, of course, are evidence against him. But to take an account of his receipts and payments from 1875 is quite another matter. That involves the disallowance of every payment which the defendant cannot now prove that he is entitled to have allowed as against the plaintiff. Such an account is necessary to ascertain what the defendant ought to have had on August 9, 1889; but it is not necessary to ascertain what in fact he then had. I see nothing in the nature of the accounts which renders it necessary in this case to go further back than six years, even if clause (a) does apply, and to do so would, in my opinion, be inconsistent with that clause. If clause (a) does not apply, clause (b) I think does; and, by introducing the analogy of an action of debt for money had and received, clause (b) protects the defendant from all liability to account for more than six years before action. Whichever clause applies, the defendant is protected from demands more than six years old. Sect. 8 is cumbrously worded, and it is difficult to grasp the idea which underlies it; but the short effect of s. 8 appears to me to be that, except in three specified cases (namely, fraud, retention by a trustee of

(1) L. R. 5 H. L. 656.

(2) L. R. 5 H. L. 672.

trust money when an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them. For the above reasons I am of opinion that the plaintiff's cross-notice must be dismissed, and the plaintiff must pay such costs (if any) as were occasioned by it, and these costs must be set off against the costs payable to the plaintiff by the defendant in respect of his appeal.

C. A.
1896
How
v.
EARL
WINTERTON.
Lindley L.J.

LOPES L.J. I have read the judgment which has just been delivered, and I entirely agree with it.

RIGBY L.J. I am of the same opinion, but I feel it my duty to say a few words about the construction of this s. 8. I have nothing to add about the earlier part. That seems plain enough having regard to the decisions. With regard to clause (a), that, of course, assumes there is a right of action against the trustee. That must be founded on some act of his or some omission, which act or omission would be, from the fact of his being a trustee, a breach of trust. Clause (a) provides that all rights and privileges conferred by any statute should be enjoyed in like manner and to the like extent as they would have been if the trustee had not been a trustee. I think it is quite obvious that this clause (a) has to do with remedies only and not with causes of action, and did not intend to suppose a case in which the cause of action or the corresponding obligation had gone. That was supposed to continue, and, if in such a case there had been any Statute of Limitations applicable as against a person who was not a trustee, I understand clause (a) provides that that particular right or privilege is to be given to him as though he had not been a trustee: not as though he had not committed any breach of duty, or been guilty of any negligence—not that at all—but as though, the breach of duty being the same as it was, he had not been a trustee. That I conceive to be the meaning of clause (a). You must suppose the right of action to exist, and generally one may say that a trustee who undertakes a trust agrees to

C. A.
1896
HOW
c.
EARL
WINTERTON.
Rigby L.J.

perform that trust. Throw away the idea of breach of trust, and the equitable position in which he is placed by that reason, he is still guilty of a breach of duty, and he is to be treated as though the breach of trust were nothing more or less than a breach of duty by reason of some act or omission of his. I very much lean to the opinion—in fact I entertain it with some confidence—that this case may be brought within clause (a), and that here it was the trustee's duty year by year to set apart the balance he had in his hands of the rents and profits towards providing a fund on which the annuitant in case of necessity would have a charge. It is a clear breach of duty. It was also a breach of trust; but as I read clause (a) it is as though it were a breach of duty. It is not to be treated as an innocent thing, but it is to be treated as would be the case with any person who was placed, under such circumstances, under a duty. Of course it may happen that a duty is thrown on him by virtue of his simple contract to undertake the trust, or it may be by reason of a covenant to undertake it, as where the duty is thrown on him by a deed. Then you must look to the appropriate Act of limitations, that which would have been applicable if the duty had not been performed; but throwing aside the question whether it was a breach of trust or not, and for the reasons given, I agree that in this case the appropriate statute would be applicable to an action on an implied promise, or it might be an express promise, and that would be six years. In other cases the appropriate statute might be a different one, and the length of period for the running of the statute would be different.

I do not think it necessary to say anything about clause (b), because, if the true view is that it does not fall within clause (a), then I think, on a proper interpretation of clause (b), it ought to be held to fall within clause (b). The only thing is, you might say, this is not an action to recover money. But I do not think that means money as belonging to the person. It is, in substance, an action to make the trustee pay money, and to pay money into a fund as against which the applicant has a claim. Whether it falls within clause (a) or clause (b), I feel reasonably satisfied it falls within one or the other—preferably

I should say clause (a), but whether one or the other the period is six years, and therefore the cross-appeal fails.

Solicitors for plaintiff: *Bramall, White & Sanders, for Harvey & Harvey, Southsea.*

Solicitors for defendant: *Crowders & Vizard, for R. H. Mellersh, Godalming.*

W. W. K.

C. A.

1896

How

v.

EARL

WINTERTON.

In re HANNAN'S EMPRESS GOLD MINING AND
DEVELOPMENT COMPANY.

CARMICHAEL'S CASE.

C. A.

1896

July 27.

Company—Underwriting Contract—Authority to apply for Shares—Authority coupled with an Interest.

P. promoted a company for the purpose of purchasing from him and working a mining property. On February 21, 1896, C. signed an underwriting letter addressed to P. by which he agreed, in consideration of a commission, to subscribe for 1000 shares in the company, such number to be reduced according to the number of shares taken by the public. C. further agreed that the agreement and application should be irrevocable, and, notwithstanding any repudiation by him, should be sufficient to authorize P. to apply for shares on behalf of C. and the company to allot them. P. by letter accepted these terms. The company was incorporated on March 24, and the subscription list was advertised to open on March 27, and close on the 30th. On March 27 C., who had applied for 1000 shares, stopped the cheque he had given for the deposit, and on the 30th wrote to P. and to the secretary of the company repudiating the agreement. P., however, on April 2, applied on behalf of C. for 980 shares, which, in the events which had happened, was the number he was bound to take, according to the terms of the letter, and the company allotted these shares to C. and put him on the register in respect of them :—

Held (affirming the decision of Stirling J.), that C. was rightly placed on the register and was not entitled to have his name removed, for that the authority given to P. by the underwriting letter to apply for shares on behalf of C. was an authority coupled with an interest, and therefore not revocable.

THIS was an appeal by Carmichael from a decision of Stirling J. refusing an application to strike his name out of the register of shareholders.

The company was brought out in February, 1896, and was formed to purchase from Mr. C. B. Phillips and work certain

C. A. mining property of his. The price was 145,000*l.* The company
 1896 was to have a nominal capital of 175,000*l.* in 1*l.* shares. The
 CARMICHAEL'S purchase-money was to be paid, as to 58,333*l.* in fully paid-up
 CASE. shares, as to 30,000*l.* in cash, and as to 56,667*l.* in cash or
 shares.

On February 21, 1896, Carmichael signed an underwriting contract in the form of a letter addressed to Phillips: "I agree, for the consideration below stated, to subscribe for 1000 shares of the above issue, and to pay for the same on the conditions named in the prospectus, or any modification thereof, or of the title of the company, or the directors or officers, so long as the capital of the company and the purchase price of the property are not altered; and I hereby enclose my application for such shares and a cheque for 2*s.* 6*d.* per share deposit in respect of such shares, which deposit I authorize and request you to pay over to the above-named company; and I undertake to pay the further moneys payable in respect of any shares I have to take up under the terms of this contract. If, on or before the public issue of the prospectus, there are 60,000 shares of the above issue bonâ fide and duly applied for by the public, then no allotment is to be made to me in respect of this agreement, and my application and the said deposit is to be forthwith returned to me by the said company. If less than such 60,000 shares are applied for by the public, then I am only to be allotted my proportion of the deficiency between the amount so subscribed for by the public and such 60,000 shares, pro ratâ with any other persons who have signed or may sign underwriting contracts in connection with the above issue. If on the public issue of the prospectus, and before the closing of the list, I deliver to you applications for shares from responsible persons to your satisfaction, such applications shall go primarily in relief of my obligation under this contract. In either case, I am to receive from you a commission of 7½ per cent. in cash and 7½ per cent. in fully paid shares of the said company upon the total shares hereby underwritten by me within fourteen days after the completion of the purchase by the above company, if the whole of such 60,000 shares are applied for by the public; but in the event of the public not applying for the whole of such

60,000 shares, then such commission is to be payable by you within fourteen days after payment by me to the company of the allotment-money in respect of my proportion of the deficiency of such shares, or the completion of the purchase by the above company, whichever event shall be last; and I authorize you, if you think fit so to do, to apply my said commission or any part thereof in payment to the company of or on account of the said allotment-moneys. I further agree that this agreement and my said application shall be irrevocable on my part, and shall, notwithstanding any withdrawal on my part or any repudiation of my responsibility hereunder or thereunder, be sufficient to authorize and empower you to make any further or other application on my behalf, and also be sufficient to authorize and empower the directors of the company to allot to me the before-mentioned shares, and to enter my name on the register of members in respect thereof."

C. A.

1896

CARMICHAEL'S
CASE.

On February 22 Carmichael signed and handed in an application for 1000 shares, and gave a cheque payable to the company for 125*l.*, the amount of the deposit payable on application.

On the same day Phillips sent to Carmichael a letter headed with the name of the company: "I accept your underwriting contract on the terms mentioned to the extent of 1000 shares. C. B. Phillips."

On March 24 the company was incorporated, and advertisements were issued stating that the subscription list would open on the 27th and close on the 30th of that month.

On the 27th Carmichael directed his bankers not to pay the cheque, which accordingly they refused to pay. On the 30th he wrote to Phillips repudiating his underwriting contract, and on the same day wrote to the secretary of the company the following letter: "Please take notice that I withdraw my underwriting in above company, and withdraw any authority contained in the underwriting letter to apply for any shares on my behalf."

At a board meeting of directors on April 2 the secretary produced the last-mentioned letter. Mr. Phillips, who was present, then produced the underwriting letter, insisted that

C. A.
1896
CARMICHAEL'S
CASE.

Carmichael had no right to withdraw, and handed in on his behalf a fresh application for 980 shares in pursuance of the underwriting contract, that being the number which, according to the contract, ought, in the events which had happened, to be allotted to him. They were accordingly allotted to him, and he was placed on the register in respect of them.

Stirling J. held that the authority given to Phillips by the underwriting letter was an authority coupled with an interest, and therefore irrevocable. His Lordship, therefore, refused to remove Carmichael's name from the register. Carmichael appealed.

Bramwell Davis, Q.C., and *Mushet*, for the appeal. In this case there is no doubt an irrevocable contract to apply for shares; but the authority to apply for shares in Carmichael's name might be revoked, not being an authority coupled with an interest. A contract not to revoke an authority is of no effect, any more than an undertaking not to withdraw an offer. The difference between contract and authority is strongly laid down in *Toppin v. Healey* (1), where an authority to obtain a loan on certain terms was given with an agreement to pay a commission for obtaining it, and the authority was afterwards withdrawn and other terms substituted. It was held that the authority was well revoked. This is not an authority coupled with an interest, for the interest must be one subsisting at the time, and a subsequent acting and incurring expense on the faith of it after the revocation could not make it irrevocable. *Smart v. Sandars* (2) and *Clerk v. Laurie* (3) explain the law as to an authority coupled with an interest.

Buckley, Q.C., and *W. F. Hamilton*, for the company, were not called upon.

LINDLEY L.J. I do not think there is any difficulty in this case. Mr. Bramwell Davis has asked us to treat this as a complex transaction consisting of two parts—one a contract and one an authority, and he says, "Although I agree that I

(1) 11 W. R. 466.

(2) 5 C. B. 895.

(3) 2 H. & N. 199.

cannot revoke my contract, still I am at liberty to revoke my authority." Now, I do not mean to say that there may not be cases as to which that contention would be well founded; but when we look at this case and see the purpose for which the authority is given and the object of it, which is to enable a contract to be performed in which Mr. Phillips was interested, his argument will not hold. Let us look at the document itself. It is a letter, or, as it is called, an underwriting contract. Of course, it is not a contract until it is accepted. It is addressed to Mr. Phillips, the vendor of some property to this company, who was to be paid out of money raised by the issue of shares. He had, therefore, a clear and direct interest in raising the capital, out of which he was to be paid, and Mr. Carmichael knew that. That is common ground. Under these circumstances he signs this document, which is called an underwriting contract, and it is addressed to Mr. Phillips. It is in these terms: [His Lordship read the material parts of the document down to the last clause.]

Then comes this clause, which is very important: "I further agree that this agreement and my said application shall be irrevocable on my part, and shall, notwithstanding any withdrawal on my part or any repudiation of my responsibility hereunder or thereunder, be sufficient to authorize and empower you to make any further or other application on my behalf, and also be sufficient to authorize and empower the directors of the company to allot to me the before-mentioned shares, and to enter my name on the register of members in respect thereof." Now, what is the true meaning of that? It is part of a bargain by which, for valuable consideration, Mr. Carmichael agrees to take certain shares, and that is for the benefit of Mr. Phillips as he knows; and in order to enable Mr. Phillips the better to secure the performance of the contract Mr. Carmichael authorizes Mr. Phillips to apply for shares in his name, and he agrees not to revoke that authority even if he could do it without such a clause. Now, Mr. Phillips acted with perfect bona fides, and upon the terms of that authority he does apply in Mr. Carmichael's name for 980 shares, which are allotted to him. Why is Mr. Carmichael not to be held a member of this

C. A.

1896

CARMICHAEL'S
CASE.

Lindley L.J.

C. A. company? Can it under the circumstances be said, in the
1896 language of s. 35 of the Companies Act, 1862, that his name is
CARMICHAEL'S "without sufficient cause entered in the register of members"?
CASE. It appears to me there is ample cause. The attempt to make
Lindley L.J. out that he is entitled to revoke the authority although he
cannot revoke the contract entirely fails.

Stirling J. in deciding this case has referred to an observation of Williams J. in the case of *Clerk v. Laurie* (1) which runs thus: "What is meant by an authority coupled with an interest being irrevocable is this—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." That is the principle on which Stirling J. decided this case, and it appears to me the principle properly applicable to it. The appeal must be dismissed with costs.

LOPES L.J. The question in this case is whether the company had authority to allot these shares to Mr. Carmichael. That question depends on whether the authority given to Mr. Phillips, who was the vendor, was revocable or not. If it was an authority coupled with an interest, it would be irrevocable. The question that really arises is whether in this case it is an authority coupled with an interest. I think the answer is a very short and a very complete one. What was the object? The object was to enable Mr. Phillips, the vendor, to obtain his purchase-money, and, in the language of Williams J., it therefore conferred a benefit on the donee of the authority. I think, therefore, the judgment of Stirling J. is perfectly right, and that Mr. Carmichael is a member of this company, and is not entitled to have his name struck out.

RIGBY L.J. I am of the same opinion and for the same reasons, and have nothing to add.

Solicitors for appellant: *Mellor, Smith & May*.

Solicitors for respondents: *Wilson, Bristows & Carpmael*.

.FRICKER v. VAN GRUTTEN.

[1895 F. 1792.]

C. A.

1896

July 29.

Practice—Parties—Adding Plaintiff without Authority—Stay of Proceedings—Costs—Liability of Solicitor—Rules of the Supreme Court, 1883, Order xvi., r. 11—“Own Consent in Writing.”

Rule 11 of Order xvi. of the Rules of the Supreme Court, 1883, provides that no person shall be added as a plaintiff, or as the next friend of a plaintiff, in an action “without his own consent in writing thereto” :—

Held, that the consent must be the consent of the party himself in writing, and signed by him; and the consent in writing of his solicitor on his behalf, signed by the solicitor, though written and signed in his presence, would not be sufficient to bind him.

Decision of Kekewich J. reversed.

Where a person has been made a plaintiff in an action without proper authority, and orders have, without his knowledge, been made against him, under which he is liable to pay costs to the defendants, the practice is, in accordance with the rule laid down in *Reynolds v. Howell* (L. R. 8 Q. B. 398), and followed in *Nurse v. Durnford* (13 Ch. D. 764), and *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (13 Ch. D. 310), to direct a stay of proceedings in the name of the person named as plaintiff, and all proceedings against him in the action since he was added as plaintiff, and to strike out his name for the purpose of future proceedings. The solicitor who wrongly made him a party will be ordered to pay all his costs, and all the costs which he has been ordered to pay, and also all the defendants' costs (the costs of the person named as plaintiff as between solicitor and client, and the costs of the defendants as between party and party), and such costs will include the costs of the application by the person named as plaintiff to be dismissed from the proceedings.

This was an appeal from a decision of Kekewich J.

The action was commenced in December, 1895, by three persons, of whom Mr. J. Harris James was one, to recover possession of certain estates in Cornwall, and for mesne profits and the appointment of a receiver. Mr. Harris James had been adjudicated bankrupt in 1895, and Mr. Weller was his trustee in bankruptcy, but no notice was taken of this in the action.

In January, 1896, Mr. Toppin, the solicitor of the plaintiffs, was instructed to apply on behalf of the plaintiffs for the appointment of a receiver of the rents and profits of the estates in question, and he was advised that, owing to Harris James being

C. A.
1896
FRICKER
v.
VAN
GRUTTEN.

a bankrupt, and the other plaintiffs claiming to be interested through him, the proceedings were defective, and the trustee in bankruptcy of Harris James should be joined as a co-plaintiff in the action.

Mr. Toppin then issued a summons on behalf of the plaintiffs, asking for leave to amend the writ in the action by adding Mr. Weller as a co-plaintiff. Subsequently, on January 20, 1896, an interview took place at the offices of Messrs. Comins & Drewry, Weller's solicitors, between Mr. Toppin, Mr. Weller, and Mr. Comins, and at that meeting Mr. Weller was asked whether he would allow his name to be joined as co-plaintiff; and Mr. Comins, in the presence of Mr. Weller, indorsed upon the summons asking liberty to amend, "We consent on behalf of Mr. Weller, the trustee," and signed it in the name of his firm. On the same day Mr. Toppin attended before the chief clerk with the summons indorsed with this consent, and the chief clerk made a fiat for the amendment of the writ as asked by the summons. The writ was subsequently amended by adding Mr. Weller as co-plaintiff as trustee in bankruptcy of Harris James. Subsequently the plaintiffs' motion for a receiver, similarly amended, came before the Court; and Kekewich J. made no order on it except that the plaintiffs were to pay the defendants' costs of the motion. Another application was made in the action on which Kekewich J. made an order adverse to the plaintiffs.

Mr. Toppin, on the instructions of the first three plaintiffs, gave notice of appeal from those orders; and on February 26, 1896, the appeals were dismissed, and the plaintiffs were ordered to pay the defendants' costs.

Mr. Weller on March 3 took out a summons asking that the fiat of the chief clerk giving leave to add him as a co-plaintiff in the action might be rescinded, and that the applicant's name might be removed from the amended writ of summons and all subsequent proceedings in the action, on the ground that he gave no authority for the subsequent proceedings to be taken in his name; and that Mr. Toppin should pay the costs of all parties occasioned by such proceedings. He alleged that Mr. Toppin, when he asked him to allow his name to be joined,

told him that it was simply a matter of form, and no costs would be incurred (which Mr. Toppin denied); that he never intended that Mr. Toppin should take proceedings for him as his solicitor, and expose him to a liability for costs without his consent; and that he was unaware that proceedings were being taken in his name as co-plaintiff, and only found out by accident, when he happened to be in the Law Courts on other business, that orders had been made against him under which he was liable to pay costs.

Kekewich J., on the hearing of the summons, refused the application with costs, being of opinion that the rule did not require the signature to the consent to be in the handwriting of the person consenting, and that Mr. Weller must be taken to have authorized Mr. Comins to sign on his behalf.

Mr. Weller appealed from this decision.

It appeared that after the issue of the summons to rescind the fiat some of the defendants had put in an execution for the amount of their costs into Mr. Weller's offices, which he had paid out. An undertaking was offered at the Bar on the defendants' behalf that if the appeal were allowed the money which they had received should be returned to Weller upon the terms that no action should be brought by him either against them or the sheriff in respect of the execution, the parties leaving it to the Court to decide as to who should bear the sheriff's fees which he had deducted from the sum paid.

Shearman, for the appeal. The consent signed by Comins & Drewry is not sufficient to bind Mr. Weller. Rule 11 of Order xvi. of the Rules of 1883 is: "No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto." Under that, before a man can be added as a plaintiff he must have put his signature to the consent, or, if he cannot write, his mark in the ordinary way. In the corresponding rule in the Rules of 1875 the provision was simply that a man was not to be joined as plaintiff "without his consent thereto." The provision as to writing in the present rule must mean a man's own consent given in his own handwriting, and

C. A.
1896
FRICKER
v.
VAN
GRUTTEN.

C. A.
1896
FRICKER
v.
VAN
GRUTTEN.

must have been inserted to prevent any dispute as to agency in giving the authority. Under rule 2 of Order xvi. the Court can, where an action has been commenced by mistake in the name of a wrong person as plaintiff, order any other person to be substituted or added as plaintiff. There is no provision there as to consent; but it was held in *Tryon v. National Provident Institution* (1) that the rule must be read with rule 11, and a person cannot be added as a plaintiff without his consent in writing.

[RIGBY L.J. That case is not the same as this. There there was an attempt to make a man a plaintiff in spite of his dissent.]

The consent must be *propria manu*; it is not sufficient that it should be given verbally or in writing by some one in the presence of the party. This is a technical objection, but there is substance in it, as Mr. Weller never understood that he would come under any liability by being added as a plaintiff, and he never consented to Mr. Toppin acting as his solicitor.

Crispe, for Mr. Toppin. The Rules of Court were made to facilitate business, and if it had been intended that a man should sign his consent the rule would have so provided. The rule is practically a re-enactment of ss. 34 and 35 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and there the provision is that the person or persons to be added as plaintiffs must consent "either in person or by writing, under his, her, or their hands." There is no such hard and fast provision in the present rule, and that shews that it was not to be continued.

[RIGBY L.J. The present rule does not allow consent in person.]

Where in an Act of Parliament a person's signature to a writing is required, it is so expressly provided. Thus, in Lord Tenterden's Act (9 Geo. 4, c. 14), s. 6, it is provided that no action is to be brought to charge any person upon any representation or assurance as to character, unless such representation or assurance is made in writing, signed by the party to be charged therewith. So, too, in s. 2, sub-s. 4, of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), it is provided that every

requisition for a search under the section shall be in writing signed by the person making the same; and in the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 61, 64, it is provided that jurisdiction may be obtained in certain cases by the consent or agreement of the parties in writing signed by them or their solicitors.

The act of a person's solicitor, if duly authorized, is his act, and Mr. Weller cannot say that he did not authorize this.

[LINDLEY L.J. It seems to me that the word "own" in the rule is an abbreviated mode of saying "under his hand."]

The word is surplusage. If I consent, it is my own consent; and if I instruct a person to put into writing what I consent to, and authorize him to sign it, that is my own consent. According to the appellants, it must be read "without his written consent in his own writing."

This question arises now for the first time. In *Jackson v. Krüger* (1) and *Tryon v. National Provident Institution* (2) no consent had been given at all.

Mr. Toppin ought not to be made to pay all the costs subsequently incurred. What was done was done by Mr. Weller and his solicitor.

Foote, for defendants. It is immaterial to the defendants whether Weller is dismissed from the action or not, so long as they are not prejudiced with regard to the costs which he has been ordered to pay them, and that is the only interest which they have in the matter. As regards us, he cannot deny that he was rightly made a party. The applications could not have come before the Court at all unless he was a party, and no costs could have been incurred. What he has done has enabled these costs to be incurred, and he is estopped from denying that he is liable for them. The indorsement was made by his solicitor, not acting for him generally, but for the very purpose; and he is in the same position as if the chief clerk had shewn him the indorsement, and asked him whether it was his consent, and he had assented. That must be his "own" consent and not that of his solicitor.

Shearman, in reply. The object of this application is to

C. A.
 1896
 ~~~~~  
 FRICKER  
 v.  
 VAN  
 GRUTTEN.

escape liability for costs. If Mr. Weller ought not to be on the record, he cannot be liable to pay costs to anybody in the proceedings. If he has done anything actionable, the defendants can bring an action against him.

[LINDLEY L.J. Are there not cases that where a man is improperly joined as plaintiff he must pay the costs, and have a remedy against the solicitor who made him a party?]

That is not the practice now. The usual order in such a case is that the proceedings should be stayed, and the solicitor who acted without authority should pay the costs of the plaintiff as between solicitor and client, and also the costs of the defendant: *Reynolds v. Howell* (1), *Nurse v. Durnford* (2), *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (3), and *In re Savage*. (4)

[*Footnote* referred to *In re Scholes & Sons*. (5)]

It would be no good to stay the proceedings if Mr. Weller were to remain liable under the orders. He should be put in the same position as if he had never been made a party.

LINDLEY L.J. This case is important, not only to the parties, but on the question of practice. The application is by Mr. Weller, the trustee in bankruptcy of the plaintiff James, who has been added as a co-plaintiff in the action, asking to have his name removed from the writ and all subsequent proceedings in the action, including certain interlocutory orders of this Court, under which he has been ordered to pay costs.

The writ in the action was issued in December, 1895, by the three first-named plaintiffs, Mr. Weller not being then a party. An application was to be made in that action, and Mr. Toppin, the plaintiffs' solicitor, considered that Mr. Weller ought to be joined as a plaintiff. An interview took place on that subject, and there is some controversy as to what happened. Mr. Weller says that Mr. Toppin told him that his being joined was a mere matter of form, and that he would be indemnified

(1) L. R. 8 Q. B. 398.

(3) 13 Ch. D. 310.

(2) 13 Ch. D. 764.

(4) 15 Ch. D. 557.

(5) 32 Ch. D. 245.



against costs, and that in fact there would be no costs. I do not think that Mr. Toppin quite admits that, but what was done was this. Mr. Weller was asked to allow his name to be added, and Mr. Comins, of the firm of Comins & Drewry, Mr. Weller's solicitors, who was present at the interview, wrote, upon the summons asking for liberty to amend by adding Weller, "We consent on behalf of Mr. Weller, the trustee," and signed the name of his firm. That summons, with that consent indorsed on it, was taken before the chief clerk, and he thereupon made a fiat for the amendment of the writ by adding Mr. Weller as a plaintiff; and his name has been added, and has since been on the record, and is still there.

Mr. Weller found out by accident that he had incurred greater liability for costs than he had anticipated, and that orders had been made dismissing certain applications with costs after his name had been added. He said that he had never intended that Toppin should take proceedings as his solicitor, and expose him to liability for costs without his consent. He does not deny that he virtually consented upon terms, and under certain conditions annexed to his consent; but he finds himself in a great difficulty from which he desires to escape. It is argued on his behalf that the consent given by Comins & Drewry did not authorize the addition of his name as co-plaintiff. That turns upon the construction of rule 11 of Order xvi. of the Rules of 1883.

It is a long rule, but I will read the material part, which is: "No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto." What is the meaning of that? But for the word "own," I should have thought that a person whose solicitor consents for him in his presence would be bound; but when the history of the rule is looked at it will be seen that "own" is an abbreviated mode of expressing what is expressed more at length in s. 34 of the Common Law Procedure Act, 1852, where it is provided that persons to be added as plaintiffs must consent either in person or "by writing under his, her, or their hands" to be so joined.

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.  
Lindley L.J.

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.  
Lindley L.J.

The language of that Act makes it plain that the consent must be the consent of the party himself in writing. The reason of it is intelligible. It is to prevent any discussion as to whether an authority has been given or not. A person is not to be added as a co-plaintiff, nor is his name to be used as the name of the next friend of a plaintiff, unless he has given his consent in writing, and has signed it. That is the provision of the Common Law Procedure Act; and the word "own" in the present rule seems to have been introduced to emphasize the language, and it is a short form for continuing what was the old practice in the Common Law Courts under the Act of 1852, and what was, I believe, also the practice in the Court of Chancery. The object was to prevent mistakes occurring, and so that a plaintiff or next friend should not incur liability for costs without his own written authority.

If that be the true construction of the rule, Mr. Weller, who has, on the whole, the merits on his side, can take advantage of it, and can say that the order giving leave to add his name ought not to have been made. I think that is right. I think that Kekewich J. attached too little importance to the word "own." Having arrived at the construction which I have indicated, there can be no doubt that the chief clerk has been lax, and that he ought not to have allowed the consent to pass.

The case is an illustration of the trouble that was intended to be prevented by the rule, the object of which was that there should be no controversy as to the authority. It is a serious thing to make a man a plaintiff or a next friend of a plaintiff. It exposes him to risk. It is said that there was a consent given in this case, and that it was in writing. But that is not such a consent as is meant by the rule. That is the first point; and upon that we say that Mr. Weller should not have been added as a co-plaintiff.

Then comes the question of what is to be done. It seems that proceedings had been taken before Mr. Weller was aware of it, and those proceedings were unsuccessful, and the plaintiffs were ordered to pay the costs. He seems to have found that out by what may be called an accident. He loses no time, but on March 3 he takes out a summons asking that the fiat of

the chief clerk may be rescinded, and his name removed from the writ and subsequent proceedings, and that Mr. Toppin may pay the costs.

There was a time, both in the Common Law and the Chancery Courts, when, if a man's name were used on the record, though without his authority, he was bound by what was done, and his remedy was against the solicitor who had wrongly used it. That practice was discussed by Blackburn J. in *Reynolds v. Howell* (1), and he came to the conclusion, upon the authority of *Robson v. Eaton* (2), that the practice had been altered, and the plaintiffs in that case were entitled to have the action stayed without payment of costs. The old equity practice had not at that time been altered, and an illustration of it is to be found in *Bligh v. Tredgett*. (3) That was a case of a bill having been filed in the name of a man as next friend without his authority; the bill was dismissed, and he had to pay the costs, and was left to his remedy against the solicitor. The question is, which of these two rules is the correct one, and the one to be adopted, after the passing of the Judicature Acts and the rules made under them? The question was discussed twice in the year 1879, first in *Nurse v. Durnford* (4), and afterwards in *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (5); and in both of these cases the point was distinctly raised whether the Common Law practice as settled by Blackburn J. in *Reynolds v. Howell* (1) or the old Chancery practice should prevail, and the decisions were that the practice of the Courts of Common Law was the more reasonable and correct, and should be followed. In *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (5) Sir George Jessel says (6): "This is an appeal from an order of Mr. Justice Fry, on an application by the plaintiff company that the action should be dismissed, and that the solicitor should pay the plaintiffs' costs, on the ground of his not being properly authorized to represent the company. The order follows the old practice of the Court of Chancery in such cases, by which the defendant was not served with notice of

C. A.

1896

FRICKER

v.  
VAN  
GRUTTEN.

Lindley L.J.

(1) L. R. 8 Q. B. 398.

(2) 1 T. R. 62.

(3) 5 De G. &amp; Sm. 74.

(4) 13 Ch. D. 764.

(5) Ibid. 310.

(6) Ibid. 311.

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.  
Lindley L.J.

the application, but was left to get his costs from the person named as plaintiff, who had afterwards to get those costs over from the solicitor. The result was that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of the solicitor. On the other hand, according to the practice of the Common Law Courts, the defendant was served with notice of the application, and the solicitor had to pay the costs of both the plaintiff and the defendant. That appears to me to be better practice. The question is which practice is now to be followed. Since the passing of the Judicature Act that must be left to the Court to determine." He then said: "I have no hesitation in saying, as I have already said at the Rolls Court, though not with the same authority with which I now say it, that I think the Common Law practice in this case is founded in natural justice, and ought to be allowed for the future."

That is simple, and was the principle that Sir George Jessel acted upon in *Nurse v. Durnford*. (1) That being so, what ought we to do here? If we look at *Reynolds v. Howell* (2), we see that what was done was that the names of the plaintiffs were not struck out ab initio, but all proceedings were stayed. There is no gain in undoing what has already been done. What we do is this. We direct a stay of all proceedings in the name of Mr. Weller, and all proceedings against him in the action since his name has been added. That will protect him, and will stop all executions under the orders made against him. As to the money that has been paid, that should obviously be returned. Without consent we could not have made that order now; but Mr. Foote's clients have authorized him to consent, and he must give an undertaking that they will return the moneys recovered under the execution. That will leave his clients to bear a small sum which has been paid to the sheriff. As regards Mr. Toppin, he has done what he ought not to have done. He got this informal consent, and acted on it, and occasioned the trouble that we are asked to set right; and, following the course adopted in *Nurse v. Durnford* (1) and

(1) 13 Ch. D. 764.

(2) L. R. 8 Q. B. 398.



*Newbiggin-by-the-Sea Gas Co. v. Armstrong* (1), we must order him to pay all Mr. Weller's costs, and all costs which he has been ordered to pay, and he must also pay to the defendants their costs so as to indemnify them. He must pay Mr. Weller's costs as between solicitor and client, and the costs of the defendants as between party and party; and such costs must include the costs of this application both here and in the Court below. Mr. Weller's name should be struck out for the purpose of all future proceedings.

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.  
Lindley L.J.

LOPES L.J. I am of the same opinion. This case is important as regards the practice. [His Lordship referred to the facts, and continued :—]

The question arises under rule 11 of Order xvi. of the Rules of 1883, whether the consent given here was such as is contemplated by the rule. The material words of the rule are : "No person shall be added as a plaintiff without his own consent in writing thereto." What does that mean? Does it mean such consent as was given by Comins & Drewry in their writing in the presence of Mr. Weller, or does it mean a consent in the writing of the person consenting? I am of opinion that it means the written consent of the person consenting, given in writing and actually signed with his own signature. I think that there are strong reasons for that opinion, when s. 34 of the Common Law Procedure Act, 1852, which makes provision for a similar state of things, is looked at. In my opinion, the words "his own consent in writing" in the rule were intended to be equivalent to the words "by writing under his, her, or their hands" in the Common Law Procedure Act. Under that Act the consent might also have been given in person; but that provision is omitted from the present rule. I have, however, a strong opinion that the consent in writing provided for by the rule was to be the consent in writing of the person consenting, and under his own hand, as provided for by s. 34 of the Act of 1852.

It appears that Mr. Weller was for some time unaware of what was being done, but he afterwards found out that orders

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.  
Lopes L.J.

were being made under which he was made liable for costs. He then took out a summons asking to have his name struck out.

I think that the chief clerk made an order which he should not have made when he gave leave for Mr. Weller's name to be added. In my opinion, Mr. Weller was improperly made a co-plaintiff. The question is, what is to be done? I think that he is entitled to have the proceedings stayed in the same way as was done in *Reynolds v. Howell*. (1) It is clear that there was a conflict for many years between the practice of the Chancery and the practice of the Common Law Courts in this respect. I am entirely ignorant of the practice of the Chancery Courts, and am only familiar with that of the Common Law Courts; and it seems to me to be an injustice that a person should be made a plaintiff without his consent, and should not be entitled to have his name struck out without being made liable for costs, but should only have a remedy against the solicitor who made him a party. The solicitor might be insolvent, and the remedy worthless. However, the question arose in *Reynolds v. Howell* (1), and the authorities were commented on by Blackburn J., and it was held that a person in that position was entitled to have the proceedings stayed without payment of costs. That case was subsequently discussed in *Nurse v. Durnford* (2) and in *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (3), and it was eventually determined that the Common Law practice was to be preferred, and that is the practice in force now.

Then what is to be done? Mr. Toppin has been wrong throughout. He was wrong in making Mr. Weller a party, and I think that the order that Lindley L.J. has stated as to the payment of costs by him is the right one. I also agree that the money recovered by Mr. Foote's clients should be returned.

RIGBY L.J. I am of the same opinion. First, as to the construction of the rule, the emphatic words are "without his own consent in writing," and I do not entertain any doubt

(1) L. R. 8 Q. B. 398.

(2) 13 Ch. D. 764.

(3) 13 Ch. D. 310.

that they must be taken literally. The consent to be joined as a plaintiff must be a man's own, and must be in writing, and the rule was intended to put an end to any dispute as to verbal evidence whether a person has authorized his name to be used or not. I agree that the 34th section of the Common Law Procedure Act, 1852, makes that more clear than the words of the rule do. But it is said that Mr. Weller did give his consent, and therefore he is estopped from raising the objection. For myself, individually, I say that in my opinion a man who under the rule is only to be bound by a consent in writing, cannot by a consent verbally given be estopped from denying that he has consented. That would be departing from the rule. I have come to the conclusion that no proper authority has been given in accordance with the rule to make Mr. Weller a plaintiff in the action.

Then comes the question, how is the wrong done to be remedied? It appears to me that the Courts of Common Law as well as the Court of Chancery were in the habit of saying to a man, "You are made a plaintiff, and, though you have never authorized it, the Courts cannot go behind the record, and must treat you as though you had been properly made a plaintiff, and your only remedy is against the attorney who wrongfully placed you on the record." That seems to have been the practice in the Common Law Courts down to the time of *Robson v. Eaton* (1), in which Lord Mansfield took a strong line, as he often did, and amended the practice, and made an order against the attorney. The case was a remarkable one, and somewhat like the present case, in this, that the attorney who made the mistake acted *bonâ fide*. A power of attorney was brought to him which purported to have been executed by the plaintiff before the Lord Mayor of London, and to be attested by the Lord Mayor, which commissioned the attorney to bring the action, and he did so. If the power was an authority at all, it was on the face of it an authority given by the plaintiff, so that the attorney was acting upon an authority which appeared to be proper. Lord Mansfield, however, held that though he was acting in good faith he was

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.  
Rigby L.J.

(1) 1 T. R. 62.

C. A.  
 1896  
 FRICKER  
 v.  
 VAN  
 GRUTTEN.  
 Rigby L.J.

acting upon an authority which afterwards turned out to be a forgery, and he was liable for so doing, and must pay what the plaintiff had to pay, including costs.

Afterwards, Baron Parke, who was no mean authority, considered that the old decisions were more correct; but ultimately, in *Reynolds v. Howell* (1), the Common Law Courts, under the guidance of Blackburn J., emancipated themselves from the old doctrine, and adopted the principle of *Robson v. Eaton*. (2) That principle has since been applied in the Chancery Division in the two cases of *Nurse v. Durnford* (3) and *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (4), the latter of which was a decision of the Court of Appeal; and it was afterwards applied again in *Cape Breton Co. v. Fenn*. (5)

In the last-named case the action was dismissed as having been instituted without authority. The solicitor who issued the writ was made to pay the costs of the parties, including those of the official liquidator of the company, which was in liquidation. The costs of the company were directed to be taxed as between solicitor and client, and the costs of the other parties as between party and party. That settled the law upon a more satisfactory basis.

The defendants feel that they have been victimized; but some one must be the victim; and, the proceedings having been wrongly instituted the question is, who is to be responsible for that? The person who in this case has been the cause of the wrong, Mr. Toppin, is the person to pay. I agree that the order must be in the terms stated by Lindley L.J. There must be a stay of the proceedings upon the orders made against Mr. Weller, and, Mr. Toppin having purported to act as his solicitor in the action without a proper authority, he must pay Mr. Weller his costs as between solicitor and client; and, having put forward Mr. Weller as one of the persons to pay the costs ordered to be paid by the plaintiffs, he must be substituted for Mr. Weller, and must pay the costs which Mr. Weller has been ordered to pay to the defendants.

(1) L. R. 8 Q. B. 398. (3) 13 Ch. D. 764.

(2) 1 T. R. 62. (4) Ibid. 310.

(5) 17 Ch. D. 198, 210.



LOPES L.J. I agree with what Rigby L.J. has said as to the practice in the Common Law Courts being the same as that in the Court of Chancery down to the date of *Robson v. Eaton* (1); but in the remarks which I made I was speaking with reference to the practice as it existed in my own time.

C. A.  
1896  
FRICKER  
v.  
VAN  
GRUTTEN.

*Appeal allowed.*

Solicitors: *Comins & Drewry; Sidney Toppin; Robbins, Billing & Co.*

H. C. J.

*In re* MARRIAGE, NEAVE & CO.  
NORTH OF ENGLAND TRUSTEE, DEBENTURE AND  
ASSETS CORPORATION *v.* MARRIAGE, NEAVE  
& CO.

C. A.  
1896  
July 28, 30.

[1896 M. 380.]

*Company — Receiver and Manager, Order appointing — Possession — Parish Rates — Distress — Change of Occupation — Preferential Charge — Debenture — Equitable Charge — Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2 — Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 161 — Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 16.*

The existence of an equitable charge on goods does not protect them from distress for poor-rate.

Where an order is made appointing a receiver and manager of a company's business but not directing delivery-up of possession to him, and thereupon the receiver and manager enters upon the company's premises for the purpose of managing and carrying on the business, there is no change of occupation within s. 16 of the Poor Rate Assessment and Collection Act, 1869; and accordingly, under s. 2 of 43 Eliz. c. 2, and s. 161 of the Metropolis Management Act, 1855, the company's goods are liable to distress for the whole of the parish rates made for the half-year in which the order has been made; and this right of distress vested in the churchwardens and overseers of the parish prevails as against the equitable charge created by debentures charging, in the usual form, all the property of the company, where there is no assignment of chattels in the covering deed.

Whether possession taken by a receiver appointed under an order directing the company to deliver up possession to him creates a change of

(1) 1 T. R. 62.

C. A.

1896

*In re*MARRIAGE,  
NEAVE & Co.NORTH OF  
ENGLAND  
TRUSTEE,  
DEBENTURE  
AND ASSETS  
CORPORATION*v.*  
MARRIAGE,  
NEAVE & Co.

occupation within s. 16 of the Poor Rate Assessment and Collection Act, 1869, *quære*.

*Richards v. Overseers of Kidderminster* (ante, p. 212) considered.

MARRIAGE, NEAVE & Co., LIMITED, was a company carrying on business at the Albert Bridge Flour Mills, in the parish of St. Mary, Battersea. On June 30, 1890, the mills were demised by the company to two trustees for the residue of the term for which the company held them, less three days, upon the trusts declared by the next-mentioned indenture. On the same date a debenture trust deed was executed to secure an issue of first mortgage debentures. By that deed, after reciting the demise of even date, the company conveyed to the two trustees "all its property wheresoever and whatsoever, present or future, other than its interest or interests in the said hereditaments, and also, by way of conveyance and not of exception, all rights of the company, including uncalled capital on the present or any new shares, excepting only from this conveyance such chattels in England, Wales, or Ireland as are or may be under the statutes relating to bills of sale incapable of being validly charged by any bill of sale not duly registered": the deed constituting a floating security in the usual form with the usual trusts; and there was a power for the trustees to appoint a receiver, such receiver to be deemed the agent of the company.

On the same day another trust deed was executed in the same form as a security for an issue of second mortgage debentures.

The company, by each debenture, charged with the payment of the principal sum and interest thereby secured "all its property whatsoever and wheresoever, both present and future, not comprised in or subject to the trusts of or effectually charged by" the trust deed.

On February 6, 1896, Edward Paterson was appointed by the trustees under the second debenture trust deed receiver and manager on behalf of the second mortgage debenture-holders. On February 17, 1896, Edward Paterson and James Henry Stephens were appointed receivers and managers on behalf of the first mortgage debenture-holders by an order of the Court in an action brought by those debenture-holders. The order

did not go on to direct the company to give up possession of their premises to the receivers and managers; but the latter did on the same day enter on the company's premises for the purpose of managing and carrying on the business.

On February 19 the company passed an extraordinary resolution to wind up, and J. H. Stephens was appointed voluntary liquidator. Previously, on October 26, 1895, the churchwardens and overseers of the parish of St. Mary, Battersea, had made certain rates in respect of the company's premises. These rates were made in advance for the half-year ending March 25, 1896, and amounted in the whole to 307*l.* 10*s.*, comprising "poor rate, sewers rate, lighting rate, and general rate."

On November 12, 1895, the rates were demanded of the company in the usual way, and as they were not paid, the company were, on February 21, 1896, served with a summons by the churchwardens and overseers; and on the hearing of the summons on March 2 the usual distress warrant was issued by the justices for the full amount and costs, 307*l.* 13*s.* 6*d.*

On March 10, 1896, the churchwardens and overseers took out a summons, asking that, notwithstanding the appointment of the receivers and managers in the action, they, the applicants, might be at liberty to distrain upon the goods and chattels of the company for the 307*l.* 13*s.* 6*d.*

The summons came on for hearing on March 24, 1896, before Kekewich J., who held, following a decision pronounced by him a few days previously, on March 18, in a case relating to the same company, *Paterson v. Gas Light and Coke Co.* (but subsequently, on June 9, reversed by the Court of Appeal (1)), that a change of occupation, within the meaning of s. 16 of the Poor Rate Collection and Assessment Act, 1869, took place on February 17, 1896, when the receivers and managers were appointed and entered on the company's premises, and that, as from that date, the receivers and managers must be regarded as "new occupiers" of the premises; and accordingly that the goods and chattels upon the premises were not liable to distress for the rates in question. The 307*l.* 13*s.* 6*d.* was subsequently

C. A.

1896

*In re*MARRIAGE,  
NEAVE & Co.NORTH OF  
ENGLAND  
TRUSTEE,  
DEBENTURE  
AND ASSETS  
CORPORATION*v.*  
MARRIAGE,  
NEAVE & Co.

(1) Ante, p. 476.

C. A.  
1896  
~~~~~  
In re
MARRIAGE,
NEAVE & Co.
NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION
v.
MARRIAGE,
NEAVE & Co.

apportioned under the section, and on a formal demand being made by the churchwardens and overseers the receivers and managers paid them 80*l.* 14*s.* 6*d.*, being the proportion from February 17 up to March 25.

The churchwardens and overseers then appealed from the order of Kekewich J. by asking that they might be at liberty, notwithstanding the appointment of the receivers and managers, to distrain upon the goods and chattels of the company in the custody of the receivers and managers for 226*l.* 19*s.*, the proportion from October 26, 1895, the date of the making of the rates, and February 17, 1896.

The appeal was heard on July 28 and 30, 1896.

Warrington, Q.C., and *Lyttelton Chubb*, for the appellants, the churchwardens and overseers. The question turns on the effect of the statutes under which rates can be assessed and recovered. Sect. 2 (*al.* 4) of the original Poor Relief Act (43 Eliz. c. 2; Revised Statutes, 2nd ed. vol. i. p. 547), enables the justices to make rates and assessments in aid of parishes not able to relieve their own poor, and empowers the churchwardens and overseers, "by warrant from any two such justices of the peace as is aforesaid, to levy . . . the said sums of money, and all arrerages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, as the sums of money or stock which shall be behind upon any account to be made as aforesaid, rendering to the parties the overplus." That right of distress is extended by s. 161 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), to all rates levied by the overseers of the poor, namely, the sewers rate, lighting rate, and general rate. The enactment which affects the present case is s. 16 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41). (1) By

(1) Sect. 16 is as follows :—

"If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made,

the overseers shall enter in the rate-book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated

s. 20 the words "poor rate" in the Act extends, in the metropolis, to every rate made by the overseers and chargeable upon the same property as the poor-rate. The question here is whether the appointment of the receivers and managers and the entry by them upon the premises on February 17, 1896, operated as a change of occupation within the meaning of s. 16 so as to prevent the churchwardens and overseers from distraining for the rates made on the company for the then current half-year. We contend that there was no change of occupation—that the company had not "ceased to occupy" within the meaning of the section, and that the receivers and managers were not "occupiers" at all for the purposes of that section. The receivers and managers are not in actual possession of the premises. They are only on the premises for the purpose of managing the business, and no order has been made for delivery up of possession to them. We rely on the decision of this Court in *Paterson v. Gas Light and Coke Co.* (1)—which dealt with the arrears of gas-rate due from this same company—and *In re Smith* (2), there approved of. An "occupier" means a person in occupation as tenant of the premises. A receiver is not an "occupier" within the purview of the rating Acts: he is nothing more than the custodian of the property, holding possession for the benefit of all parties, and the only party liable for the rate is the party entered on the rate-book as occupier, in this case the company.

[LOPES L.J. In the recent case of *Richards v. Overseers of Kidderminster* (3) North J. has held that the entry into possession by a receiver appointed under a debenture trust deed creates a change of occupancy within s. 16.]

from the date so entered by the overseer, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner, and with the like remedy of appeal, as if he had been rated when the rate was made; and an outgoing occupier shall

remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made; and the twelfth section of the statute 17 Geo. 2, c. 38, shall be repealed."

(1) Ante, p. 476.

(2) [1893] 1 Q. B. 323.

(3) Ante, p. 212.

C. A.
1896
In re
MARRIAGE,
NEAVE & Co.
NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION
v.
MARRIAGE,
NEAVE & Co.

C. A.

1896

*In re*MARRIAGE,
NEAVE & CO.NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION*v.*MARRIAGE,
NEAVE & CO.

That case was decided before the appeal in *Paterson v. Gas Light and Coke Co.* (1), and is therefore open to question. We submit that possession by a receiver is not such a change of occupation as is contemplated by the Act.

Then, with regard to the ownership of the goods. The goods on which we seek to distrain are not covered by the debenture trust deed, and they therefore belong to the company. Neither are they taken out of the possession of the company by the debentures themselves. A debenture charging the goods of the company is merely an equitable charge by way of a floating security, the goods remaining the property of the company subject to that charge. Even if the debentures and the trust deed were to be regarded as bills of sale requiring registration under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43)—which they are not—they would, under s. 14, be no protection against distress for rates. Accordingly we submit that the goods of this company are liable to distress as being goods of the “offender” within 43 Eliz. c. 2.

Levett, Q.C., and *A. R. Kirby*, for the plaintiffs, representing the first debenture-holders. *Paterson v. Gas Light and Coke Co.* (1) is no guide to the present case, for the question there turned upon a section of a special Gas Act, the language of which was quite different from that of s. 16 of the Act of 1869. Under the Poor Relief Act (43 Eliz. c. 2) the warrant of distress is granted against the goods of the “offender.” The overseers, therefore, have only a right of distress against the “offender’s” goods, and they have no higher right to the goods than he has. The test of liability under s. 16 of the Poor Rate Collection and Assessment Act, 1869, is “occupation.” What, then, is the “occupation” of a corporation? A corporation cannot be physically in occupation of property: it can only occupy by its servants or agents, and it is only those servants or agents who can properly be said to be in “occupation.” So occupation by a receiver is not the occupation of the company, but of the receiver, either by himself or his servants. Where, as here, the receiver is also manager, he is managing not for the company, but for the Court: he is the servant of the Court, and

(1) *Ante*, p. 476.

looks to the Court, not to the company, for his orders as to raising money for carrying on the business or otherwise; and again, his servants by whom he manages look to him and not to the company: he is their master, and can discharge them at any time quite independently of the company. Therefore, the persons who are working at the company's mills in the present case are really the servants of the receivers and managers, and not of the company at all. If that is so, then a change of occupation has been created by the appointment of the receivers and managers and their taking possession: *Richards v. Overseers of Kidderminster*. (1) The fact that the former servants of the company may have been taken on by the receivers and managers makes no difference in this change of occupation.

Again, as the overseers can only distrain on the goods of the "offender," they are in a different position to a landlord, who has a paramount right of distress upon any goods he finds on the premises. This distinction is illustrated by the Bills of Sale Act (1878) Amendment Act, 1882, which contains a special enactment (s. 14) giving overseers, in a case where a bill of sale has been executed, the same priority to distrain for rates as a landlord has for rent.

But further, under the Statute of Elizabeth, the goods subject to distress must be goods belonging to the person who has been assessed. Here it is the company, and not the receivers, who have been assessed. The remedy given by the statute is only against the person assessed and the goods of that person—that is, in the present case, the company. For instance, goods in the hands of the legal personal representatives of a testator or intestate cannot be distrained upon for rates, if those legal personal representatives have not themselves been assessed: *Stevens v. Evans*. (2) Are, then, these goods the goods of the company? We submit not. They are assigned to the trustees of the debenture deed. It is true, they are expressed to be excepted; but the exception is intended to have reference to the Bills of Sale Acts only, and is inserted by way of precaution against the requirements of those Acts. It has been held,

C. A.
1896
In re
MARRIAGE,
NEAVE & Co.
NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION
v.
MARRIAGE,
NEAVE & Co.

(1) Ante, p. 212.

(2) 1 W. Bl. 284.

C. A.
 1896
In re
 MARRIAGE,
 NEAVE & Co.
 NORTH OF
 ENGLAND
 TRUSTEE,
 DEBENTURE
 AND ASSETS
 CORPORATION
 v.
 MARRIAGE,
 NEAVE & Co.

however, that those Acts do not apply to mortgages or charges of an incorporated company: *In re Standard Manufacturing Co.* (1) Therefore this deed must be treated as an absolute conveyance of all the company's property. Again, the effect of the debentures themselves is that the goods belong to the debenture-holders subject only to the company's equity of redemption—that is to say, until the company pay off the charge, the goods belong to the debenture-holders. At all events, new goods or stock brought on the premises since the appointment of the receivers and managers do not belong to the company. It has been held that the rights of debenture-holders prevail even against execution creditors: *In re Standard Manufacturing Co.* (1); *In re Opera, Limited* (2), and that therefore they are equally effective against a distress: *Richards v. Overseers of Kidderminster.* (3)

[LOPES L.J. It is stated in Burn's Justice of the Peace (30th ed. vol. iv. ("Poor"), p. 1085) that "The goods only of the party assessed can be taken under the distress. The 43 Eliz. c. 2, s. 4, enacts, &c., 'by distress and sale of the offender's goods.' The 17 Geo. 2, c. 38, s. 7, says, 'the goods of any person assessed.' It is otherwise as to the assessed taxes, for which any goods on the premises may be distrained."]

That is so. Here the legal ownership of the goods has passed to the receivers, subject to the equitable right of the company to come in at a certain time and redeem their property.

Warrington, Q.C., in reply.

[LINDLEY L.J. We only wish to hear you on the construction of the deed.]

The trustees have no power to take possession of the chattels excepted from the conveyance, nor any licence to take possession of them: neither is there any power for the debenture-holders to take possession: all they can do is to get a receiver appointed to hold possession for the benefit of themselves, the company, and every one else. There is no legal title to the goods in the trustees or the debenture-holders either under the deed or the debentures themselves. The position of the overseers is quite

(1) [1891] 1 Ch. 627.

(2) [1891] 3 Ch. 260.

(3) Ante, pp. 212, 222-3.

distinct from that of an execution creditor. That is clear from the form of the distress warrant and of the writ of fi. fa. The right of recovering rates by distress is a preferential charge given ab initio by statute, whereas an execution creditor must by action obtain a judgment and then get a writ of fi. fa. In *Richards v. Overseers of Kidderminster* (1) there was a legal assignment of the chattels, and not merely an equitable charge as there is here. The passage in the judgment of North J. in that case (2), as to the right created by debentures being as effective against a distress as against an execution creditor, is a mere opinion or dictum, and the point was not in fact argued.

With regard to the question of change of occupation within s. 16 of the Act of 1869, the appointment of a receiver does not put an end to existing contracts by the company: all the receiver has to do is to pay the debts thereby created. And as to contracts for service, the servants of the company remain so until the receiver discharges them.

The possession of the company's property remains in the company through the receiver or his servants, the receiver being merely in the position of a custodian or caretaker.

LINDLEY L.J. The first question we have to consider is whether there has been such a change of occupation as brings into operation the 16th section of the Poor Rate Assessment and Collection Act, 1869. On February 17, 1896, Messrs. Paterson and Stephens were appointed by the Court receivers and managers in an action instituted by debenture-holders against Marriage, Neave & Co. That order does not contain—and the omission is, to my mind, very important—any direction whatever for delivery-up of possession of the land to those gentlemen; and moreover it does not appear from the affidavits that they have taken possession of the land in any sense at all. What they have done is this: they have gone on to the property for the purpose of receiving and managing the income and business of the company, but they have not done anything to change the ostensible possession of the property in any

C. A.

1896

In re
MARRIAGE,
NEAVE & Co.

NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION

v.
MARRIAGE,
NEAVE & Co.

(1) Ante, p. 212.

(2) Ante, p. 223.

C. A.
1896
~~~~~  
*In re*  
MARRIAGE,  
NEAVE & Co.  
NORTH OF  
ENGLAND  
TRUSTEE,  
DEBENTURE  
AND ASSETS  
CORPORATION  
*v.*  
MARRIAGE,  
NEAVE & Co.  
~~~~~  
Lindley L.J.

way whatever; and, upon the facts, it appears to me that the possession and occupation have not been changed at all.

Mr. Levett argued that, inasmuch as corporations can only occupy by their agents, the appointment of a receiver by an order of the Court is quite enough to create a change of possession. I do not take that view of the law. A corporation can possess and can occupy. The mere fact that a receiver is appointed by an order which does not in fact order the company to give up possession does not dispossess the company. I do not think, therefore, that there is such a change of occupation made out as is requisite to bring into operation the 16th section of the Act of 1869. That section runs thus: [His Lordship read it, and continued:—]

Now, the overseers have not entered in the rate-book the names of the receivers as “the persons who succeed or come into the occupation,” nor, in my judgment, was it necessary for them to do so. The real truth is that the company were and are still, in point of law, in occupation of the property, and the receivers are there as managers of the company’s business. A receiver has no right that I know of to discharge people contrary to contract. It is a mistake to suppose that, because a receiver may hire and dismiss servants, which of course he may do so long as he breaks no contract, therefore he ousts the company. That is not the case at all. These gentlemen are receivers and managers—it may be said instead of the company—under an order of the Court, but the legal possession remains where it was.

The next point is this. These rates can only be distrained for upon the goods of the person assessed and who has made default; that is, the “offender,” I agree. The “offender” here is the company. The company is assessed: the company has made default; and the only goods which can be taken under the distress warrant are the goods of the company. Then, are there any goods of the company on these premises which are liable to distraint? It is said, No. It is said, first of all, that the goods belong in point of law to the trustees for the debenture-holders. That turns upon the true construction of the trust deed, and on looking at the trust deed we find that

the goods of the company are expressly excepted; not, as Mr. Kirby suggested, by way of precaution only and by way of reference to the Bills of Sale Act so as to make the exception amount to nothing at all; but the goods are excepted in language which is perfectly unmistakable. Accordingly, these goods did not pass to, and never were the goods of, the trustees for the debenture-holders. Therefore the goods remain in law the goods of the company.

The next point is this. The debentures appear to be expressed in language so large as to include the goods of the company, although the trust deed does not, but their only effect is to give the debenture-holders an equitable charge upon these goods. That is all the debenture-holders want. They do not require to take possession, and they have no right even to take possession. Their only right is to institute an action and get a receiver appointed. The goods are not theirs: they are the goods of the company, subject to the equitable charge created by the debentures.

Now let us go back and see what the rights of the overseers are. The rights of the overseers under the Statute of Elizabeth and under the warrant which they have obtained are to distrain for these rates upon the goods of the "offenders." The goods in question are the goods of the "offenders," subject to an equitable charge. Mr. Levett started a point which was new to all of us, that if there was an equitable charge you could not distrain upon the goods at all. I agree that the power of distraining under the Statute of Elizabeth for poor-rates is not like the power of a landlord to distrain: we all know the difference; but it certainly astonished all of us to hear it said that the existence of an equitable charge prevented the overseers from recovering rates. It would be a very easy way of escaping from rates if that were so. That argument cannot be maintained. The duty of the overseers, as has been pointed out by Mr. Warrington, is, first of all, to seize the goods of the company. That they could plainly do. Secondly, to sell the goods of the company. That they could plainly do. Therefore we get rid of the equitable charge up to that point. Then the question occurred to us, What was to be done with

C. A.

1896

*In re*MARRIAGE,
NEAVE & Co.NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION*v.*
MARRIAGE,
NEAVE & Co.

Lindley L.J.

C. A.
1896
In re
MARRIAGE,
NEAVE & CO.
NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION
v.
MARRIAGE,
NEAVE & CO.
Lindley L.J.

the money—whether it was the business of the bailiff out of the money to pay the owners of the equitable charge in priority to the rates or not? The statute and the warrant shew that he is not to do that. The law is in accordance with the practice, that out of the proceeds of the goods distrained the rates have a priority over equitable charges and everything else. I do not say over Queen's taxes, but that we are not now discussing. The duty of the bailiff is to pay the rates and hand over the surplus to the owner of the goods. That is his duty, and that does, in effect, give these rates priority with regard to the proceeds of the goods when seized and sold under that distress. There is no action for these rates. The mode of recovering them is laid down by statute. If overseers merely had a right of action, questions would arise about priorities; but those questions are provided for by legislation, under the Bankruptcy Act and also under the Bills of Sale Act.

It seems to me, therefore, that these various objections raised on behalf of the debenture-holders fail, and that the appeal must be allowed: that is to say, that there must be liberty given to the churchwardens and overseers to distrain upon the goods of the company. Nobody, however, wants them actually to distrain. The proper form of order will be to express the opinion that they are entitled to distrain, and then the receivers and managers will proceed to pay.

LOPES L.J. I am of the same opinion. The first point arises under the 16th section of the Poor Rate Assessment and Collection Act, 1869. It is said that, the receivers having been appointed, there was a change of occupation. It seems to me perfectly clear that that contention cannot be maintained, because, when the order is looked at, we find nothing in it which directs that possession of the land be given up to the receivers. What the receivers have to do is to go there and manage the property. The occupation, in my judgment, remained in the company in precisely the same way as it did before. The company continued to occupy notwithstanding that order. That being so, there was no such change of occu-

pation as is contemplated by this 16th section. It was said that a corporation could only be occupiers by their servants, and that that was not a case contemplated by this section. The answer is that corporations are occupiers every day. We have railway companies in every part of England, and they are dealt with as occupiers and are placed on rate-books as occupiers.

Then it was said that this occupation of the company was at an end because the receiver had power to discharge servants and annul contracts, and to do various things that were mentioned. A receiver has no power at all to annul any contract—I mean a contract which has to be continued for any definite period. It was the company, and the company only, that could discharge the servants who were in their service under such contracts. The result is this, that the company continued in occupation for the purpose of this 16th section, and the receivers did not occupy the land in such a way as to make them responsible for the rates.

Then the question arises, which was dealt with by my learned brother Lindley, with regard to what goods can be seized. When this Statute of Elizabeth is looked at, it appears that the goods to be seized, and the only goods to be seized, are the goods of the “offender.” The “offender” in this case would be the company.

Then it is said that these goods which it is sought to seize were not the goods of the company—that they passed under a certain deed of trust. When the trust deed is examined, it appears that these goods were excepted, and did not pass under the deed at all: they cannot, therefore, be said to belong to the debenture-holders. The position with regard to the goods is really this, that they belong to the company subject to an equitable charge in favour of the debenture-holders.

Then another question was raised as to the effect of the equitable charge. It was said that these goods have been subjected to this equitable charge of the debenture-holders, and that therefore no distress can be issued against them or is enforceable against them. That contention certainly took me by surprise. I am conversant with the practice as to enforcing

C. A.

1896

In re

MARRIAGE,
NEAVE & Co.
NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION
v.

MARRIAGE,
NEAVE & Co.

Lopes L.J.

C. A.
1896
In re
MARRIAGE,
NEAVE & Co.
NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION
v.
MARRIAGE,
NEAVE & Co.

the payment of rates such as these, and I never heard of this point being raised before. However, when the point is looked into, it really comes to this, that there is a preferential charge in favour of rates—that rates are to be paid in preference to any equitable charge such as this is. What leads me to that conclusion is, amongst other things, this, that there is power given by statute to distrain for rates, and no action can be brought to recover them. I think this appeal ought to be allowed.

RIGBY L.J. I am of the same opinion. The affairs of this company, Marriage, Neave & Co., have given rise to two questions, one of which was decided in *Paterson v. Gas Light and Coke Co.* (1) In my judgment, that decision has absolutely nothing to do with the present case at all. That was a decision upon a particular section of the gas company's special Act, the decision being, first, that the company were within the general words of a section entitling them to cut off the gas, and, secondly, that they were not within a clause introducing exceptions to the general powers so given. In the present case we have other Acts of Parliament to consider. I have very little to add to what has been said with regard to the alleged change of occupation under s. 16 of the Act of 1869. It is only where there is a change of occupation that that section has any operation. The argument that, because a receiver and manager is appointed, then ipso facto the company or persons carrying on business are turned out, is neither reasonable nor plausible. It is quite conceivable that these receivers might have performed all their duties without even seeing this property. They were to carry on the business: they could have appointed a manager of that business under them, to take his instructions from them. It might never be necessary for them to go near the property at all.

Then it is said that the servants of the company have become the servants of the receivers. It may be that the servants are liable to obey the orders of the receivers because a competent power has reposed in them the management of the business: I do not say whether the servants are or are not bound therefore to obey; but that a receiver becomes liable, by

(1) Ante, p. 476.

virtue of his appointment, to pay out of his own pocket wages or salaries, or to fulfil at his own expense any other contracts of the company, is a doctrine that I do not think can be established—at any rate under such circumstances as exist in the present case. The receiver is the manager, that is all; and it may very well happen that as such manager, and for the purpose of management, the Court may direct that he shall be put into possession of the property, and if he is so put into possession it may be that he becomes the occupier within the meaning of s. 16; but that is not the point that we have to deal with now. No such order has been made, and the occupation of the company has not been interfered with; therefore s. 16 does not apply.

That being so, we are referred back to the Act of Elizabeth to ascertain what is to be done. The power of distress is there clearly prescribed, and the distress is to be of the goods of the “offender.” Now, Marriage, Neave & Co., Limited, were the persons assessed for the payment of the rates for this particular half-year; and they are the “offenders” because they did not pay.

Then it is said that the goods upon the premises were not the goods of Marriage, Neave & Co. I have nothing to add respecting the construction of the debenture trust deed, which to my mind did not carry the goods and chattels; but there is a charge given by the debentures. Does that prevent the goods from being the goods of Marriage, Neave & Co.? I apprehend not. Putting aside the Bills of Sale Act, and, considering the state of the law before any Bills of Sale Act was passed, can it be said that because a man writes on a piece of paper, “I charge my household furniture with the payment of 5*l.* in favour of So-and-so,” that the man is thereby securing himself practically from the payment of rates? The argument put forward virtually goes as far as that, for the contention is that the furniture so charged becomes the property of the person in whose favour the charge is made, and that it cannot be seized by way of distress. I think that the construction of the statute is really this, that the overseers take the goods of the “offender” as they find them; that they must distrain and sell, and pay the rates first. When they have paid the rates, I apprehend

C. A.

1896

*In re*MARRIAGE,
NEAVE & Co.NORTH OF
ENGLAND
TRUSTEE,
DEBENTURE
AND ASSETS
CORPORATION

v.

MARRIAGE,
NEAVE & Co.

Rigby L.J.

C. A.
1896
~~~~~  
*In re*  
MARRIAGE,  
NEAVE & Co.  
NORTH OF  
ENGLAND  
TRUSTEE,  
DEBENTURE  
AND ASSETS  
CORPORATION  
*v.*  
MARRIAGE,  
NEAVE & Co.  
~~~~~  
Rigby L.J.

they may be called upon in a proper way to account for the surplus, it may be to the equitable mortgagee, if any, or, if there is no equitable mortgagee, then to the owner of the goods. They have to pay the rates, and that practically gives them a preferential charge on the goods.

In the case before North J. of *Richards v. Overseers of Kidderminster* (1), it was held that there had been a change of occupation within s. 16 of the Act of 1869. That case, however, has nothing to do with the present: it is absolutely different. It was a case in which, under the terms of a deed, the company were to remain in possession until a certain event, and upon the happening of that event possession was given up. North J. held, and rightly, that there had been a change of occupation with the necessary result. True it is that in that case North J. used some expressions to the effect that the case of a distress under these statutes falls within the same principle as the case of an execution. I do not know whether the point was argued before the learned judge or not: from the report it would seem that it was not; and in fact it was not in the least necessary to decide the point for the purpose of the case before him, for, as has been pointed out, there was an actual assignment of the goods to other persons, and that assignment was relied upon. At any rate, if that decision is to be regarded as a considered judgment with reference to the position of the overseers and their right to distrain under these Acts, we are constrained to say that in our opinion it cannot be supported in that respect. In my opinion this appeal must be allowed.

[Their Lordships accordingly made a declaration that the churchwardens and overseers were entitled to distrain on the goods and chattels of the company at the Albert Bridge Mills, and gave them liberty to distrain accordingly, but with an intimation to the receivers and managers that they ought to pay the rates in question. The respondents to pay the costs of the appeal and also of the hearing in the Court below.]

Solicitors: *W. W. Young & Son; Grundy, Kershaw, Saxon, Samson & Co.*

G. I. F. C.

CUNNACK v. EDWARDS.

[1893 C. 1350.]

*Friendly Society—Failure of Objects—Surplus or unexpended Funds—Charity
—Cy-près—Bona Vacantia—Resulting Trust.*

C. A.

1895

Nov. 4.

1896

Aug. 3.

In 1810 a society was established to raise a fund, by the subscriptions, fines, and forfeitures of its members, to provide annuities for the widows of its deceased members. In 1830 the rules were revised, and the society conformed to the provisions of the Friendly Societies Act, 1829, but the objects of the society were in no way altered. By 1879 all the members had died. The last widow-annuitant died in 1892, the society then having a surplus or unexpended fund of 1250*l.*:—

Held, that there was no resulting trust in favour of the legal personal representatives of the members of the society: that the society was not a “charity,” and therefore the unexpended fund was not applicable cy-près to charitable purposes; and that the fund passed to the Crown as bona vacantia.

Decision of Chitty J. ([1895] 1 Ch. 489) reversed.

APPEAL by the Crown from the decision of Chitty J. (1)

The facts are sufficiently stated in the report of the case in the Court below.

The appeal was heard on November 4, 1895.

On the appeal the defendant Edwards, the legal personal representative of T. H. Edwards, the last surviving ordinary member of the society, abandoned his exclusive claim to the unexpended fund, and he and the other defendant Clarke, who, as is stated in the report in the Court below, had been added as defendant to represent the legal personal representatives of the deceased ordinary members as a body, now appeared by the same counsel.

Ingle Joyce (Sir R. E. Webster, A.-G., with him), for the Crown, repeated the arguments urged by him in the Court below, and, in addition to the cases there cited, referred to

(1) [1895] 1 Ch. 489.

C. A. *Collinson v. Pater* (1), and also to Lewin on Trusts, 9th ed.
1896 p. 150.

CUNNACK
v.
EDWARDS.

Robertson-Macdonald, for the plaintiffs, the trustees of the society.

Farwell, Q.C., and *W. D. Rawlins*, for the defendants. This is a case of a resulting trust in favour of the members of the society or their legal personal representatives. This is nothing more than a friendly society, and a friendly society is not a charitable institution: therefore the funds cannot be applied *cy-près*: *In re Clark's Trust* (2), a case which has never been overruled or impeached. Moreover, there is no reference to poverty in the rules of the society, and poverty in the recipient is an essential element in a "charity": *Attorney-General v. Duke of Northumberland* (3); *Commissioners for Special Purposes of the Income Tax v. Pemsel*. (4) The basis of this society was an arrangement under which the members, in the exercise of foresight and caution, bargained for certain advantages as a condition of membership. In such a case there is no "charity." The case does not differ in principle from one in which a man buys an annuity from an insurance office. It is a mode by which a man by becoming a member can purchase a provision for his widow, apart altogether from any question of poverty, and the fact of purchase excludes any notion of the society being a charity. It is like a tontine society, in which the members or subscribers contract *inter se* for certain advantages: *Oldfield v. Preston*. (5) The money was subscribed for a specific limited purpose which has come to an end, and the fund remaining undisposed of belongs, by way of resulting trust, to the subscribers or their representatives. It is not *bona vacantia* at all; and the Crown can only claim a fund as *bona vacantia* where it is impossible to find an owner. But we admit that if there is no resulting trust then the fund may be *bona vacantia*.

[They also referred to *Brown v. Dale*. (6)]

Ingle Joyce, in reply.

Cur. adv. vult.

(1) 2 Russ. & My. 344.

(2) 1 Ch. D. 497.

(3) 7 Ch. D. 745.

(4) [1891] A. C. 531.

(5) 3 D. F. & J. 398, 415-6.

(6) 9 Ch. D. 78.

1896. Aug. 3. LORD HALSBURY L.C. In the year 1810 a certain number of persons associated themselves together for the purpose of providing for their widows. They were not incorporated, and though they obtained some of the advantages which are involved in incorporation—inasmuch as they came under the protection of the Friendly Societies Acts—I do not think, for the purpose of this inquiry, those facts are important. The question which the Court has to determine would, I think, have remained the same if they had been simply an associated body of persons for the purpose which I have described. The society has lasted to a very recent period, but is now extinct. All the members are dead, but a remnant of the common fund, amounting to something over 1200*l.*, now remains.

Chitty J. has held that there is a resulting trust in favour of the personal representatives of those who contributed to the fund. I think we are all of opinion that that view cannot be maintained. The entire beneficial interest has been exhausted in respect of each contributor. It was, as I shall have to repeat in another view of the case, a perfectly businesslike arrangement: each man contributed a certain sum of money to a common fund upon the bargain that his widow was to receive, upon terms definitely settled, a certain annuity proportionate to the time during which the husband had contributed to the common fund. There never was and there never could be any interest remaining in the contributor other than the right that his wife, if she survived him, should become entitled to a widow's portion thus provided. This was the final and exhaustive destination of all the sums contributed to the common fund. Under these circumstances, I am at a loss to see what room there is for the contention that there is any resulting trust.

It is contended, however, that this association may be regarded as a charity. Wide as has been the meaning given to the word "charity" in the Court of Chancery, and, indeed, in one case by the House of Lords, a width of interpretation which I confess has seemed to me in some cases extravagant, I do not think that a perfectly businesslike arrangement like this, in which a number of persons associate together and contribute funds to provide for their own widows, has ever been regarded

C. A.

1896

CUNNACK

v.

EDWARDS.

C. A.
1896
CUNNACK
v.
EDWARDS.
Lord Halsbury
L.C.

as charity. I think the observations of Hall V.-C. in *In re Clark's Trust* (1) are entitled to great weight. His observations were directed to a society whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. In *Pease v. Pattinson* (2) and *Spiller v. Maude* (3) it was assumed by the learned judges in those cases, whether rightly or wrongly it is immaterial to consider, that the relief of poverty and suffering formed one of the elements of the associations therein discussed. Here no such question can possibly arise; it cannot be pretended that a wealthy widow would not be entitled to claim her annuity equally with a poor one. If this be a charitable institution it would be difficult to contend that every life insurance company did not fall under the same category.

I am therefore of opinion that this was not a charitable institution. The only other alternative remaining is that which I adopt, namely, that these funds are *bona vacantia*, and belong to the Crown in that character.

A. L. SMITH L.J. Chitty J. has decided that in this case there existed no gift expressing a general intent of charity so that the fund in question could be applied *cy-près* for charitable purposes; also that the Crown did not take the fund as *bona vacantia*; and he held that there existed a resulting trust in favour of the personal representatives of all those who had been subscribers to the fund, and he directed inquiries accordingly. The fund was started in 1810. The last surviving ordinary member died in 1878, the last honorary member in 1879, and the last widow in 1892, at which time the trustees of the society had 1250*l.* in hand undisposed of. The question is, What is to become of this fund? In order to determine if there be a resulting trust, it is necessary to ascertain what were the conditions under which each subscriber subscribed to the fund.

In the year 1810 certain persons in the town of Helston formed themselves into a society called the Helston Equitable

(1) 1 Ch. D. 497.

(2) 32 Ch. D. 154.

(3) 32 Ch. D. 158, n.

Annuitant Society, and agreed inter se that they would subscribe to a common fund out of which each member's widow should be provided for to the maximum extent of 25*l.* per annum during her widowhood. Each subscriber to this common fund (I am not now dealing with honorary members) did so upon the terms that if he left a widow the trustees of the society should out of that fund provide for her in the prescribed manner during her widowhood. If a member died leaving no widow, there was no resulting trust in favour of his personal representative upon his death; his subscriptions were not to be returned to them, but were to remain with the society and form part of its common fund. If a member left a widow she was to be provided for during her widowhood, and although the amount of subscriptions the member had paid might possibly not have been exhausted by making the contemplated provision for his widow, nevertheless the surplus was not to be returned to his personal representatives when the widow died, but the whole beneficial interest in what was left also formed part of the common fund of the society. In neither case was there any resulting trust in favour of the representatives of the deceased member.

But it was argued that the proper implication is that when the society itself came to an end, as it has done, there was then a resulting trust of what might happen to be in the coffers of the society in favour of all the personal representatives of those who had been members since the year 1810, and Chitty J. has so held. Now it was never contemplated that the society would come to an end; but, on the contrary, provision was made for the introduction of new members for its perpetual existence; and the existing members had power to alter and revise the rules, so that, if it was found that the society was too affluent, provision might be made as to what was to be done with what money might not be wanted. As the member paid his money to the society, so he divested himself of all interest in this money for ever, with this one reservation, that if the member left a widow she was to be provided for during her widowhood. Except as to this he abandoned and gave up the money for ever.

C. A.
1896
CUNNACK
v.
EDWARDS.
A. L. Smith L.J.

C. A.
 1896
 CUNNACK
 v.
 EDWARDS.
 A. L. Smith L.J.

The case of *Smith v. Cooke* (1), in which it was held there was no resulting trust, shews the principle applicable to such a point. In my opinion this case cannot be likened to that of a man providing a fund by way of trust for the payment of an annuity to his widow during her life, and making no provision for the fund when the widow died and her interest therein ceased, in which case there would be a resulting trust, because the implication in such a case would be that the settlor intended that when the trust came to an end the fund should revert to his representatives, he not having provided to whom it should then go. In such a case there would be no abandonment of the fund as in the present case. In my opinion there was no resulting trust in favour of all those members who had ever subscribed to the fund.

The question then arises, To whom does the 1250*l.* belong? It is admitted it does not belong to the society, for its objects have come to an end; nor to the trustees of the society, nor to the representatives of the last surviving subscriber; and as, for the reasons above, it does not belong to the representatives of the members who have subscribed since 1810, all possible claimants being exhausted, it belongs to the Crown as bona vacantia, unless the doctrine of *cy-près* is to be applied, as where there is a trust which manifests a general intention to devote a fund to charity. The question is, Do the facts of this case shew such a trust? The society, it will be noticed, was not a corporation. It had no entity different from that of each of its members. Take the society as it originally existed in 1810 down to 1830, before it adopted the Friendly Societies Act of 1829: during that period, what was the object and intention of each member joining and becoming a member of the society? Was his object to aid the widows of the other members, or only to aid his own particular widow? I cannot doubt that his sole and real object was that by becoming a member he might thus be enabled to provide for his widow more efficiently than he otherwise would have been able to do. Some of the members appear to have been of position and importance in Helston, one having been, it was stated, twice mayor, one a solicitor, and

(1) [1891] A. C. 297.

others tradesmen of the town. His object and intention in becoming a member was not to provide for the widows of the other members; that was not his object at all. It was simply and solely to make a provision for his own widow, not only by means of his own subscriptions, but also by means of the subscriptions of those members who might happen to die leaving no widows or whose widows might die shortly after becoming widows, so augmenting the common fund, together with what might be obtained by means of the subscriptions of such honorary members as could be induced to subscribe. What each man did in becoming a member was to set up and keep going a sort of mutual insurance whereby to insure a better provision for his own widow after his death than he otherwise would have been able to make.

Now, has such an act as this ever been held to manifest a general intention to devote a fund to charity, or indeed to constitute charity at all? I am aware that there are many objects besides those enumerated as charitable objects in the preamble to the Statute of Elizabeth (43 Eliz. c. 4), of which providing for one's own widow is not one, which the Courts have held to be charitable and of a public nature, either as being analogous to the enumerated objects or by being within the spirit and intent of the Act; and the recent case in the House of Lords of *Commissioners for Special Purposes of the Income Tax v. Pemsel* (1) shews that this is so; but nothing can be found in that case which gives countenance to the argument that a man, by providing a fund for the benefit of his own wife after his death, creates a charitable trust for a public purpose. There are, it is true, cases in which a gift to widows and orphans of a parish, to widows of seamen of a particular port, to twenty aged widows and spinsters, to the widows of respectable tradesmen, to poor relations generally, have been held to shew a general intention of charity; but these are gifts to a class, and very different from a gift to a man's own wife to take effect after his death. No case has been cited, nor can I find one, in which such a gift has been held to be charitable, to which *cy-près* applies.

C. A.

1896

CUNNACK

v.

EDWARDS.

A. L. Smith L.J.

(1) [1891] A. C. 531.

C. A.
1896
CUNNACK
v.
EDWARDS.
A. L. Smith L.J.

It has been pointed out that the members of the Helston Society altered its rules in 1830 so as to conform with the provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56); but I cannot see that by so doing they created a charitable trust for a public purpose if they had not done so before. What the society was before the adoption of the Friendly Societies Act as regards being a charity for a public purpose, so it remained, the provisions of that Act, as it appears to me, having been adopted, not for the purpose of altering the objects of its members, but for purposes of administration. To hold in this case that each member must be taken to have created a charitable trust for the public benefit of the place where his widow might happen to reside after his death, because his widow might otherwise have possibly gone upon the rates of that place, is to me, with all submission, so far-fetched that I cannot adopt it. It appears to me to be stretching beyond all bounds anything that has been held before to hold that this is a charitable trust for a public purpose; and for the reasons I have endeavoured to give I agree with Chitty J. and hold that it is not.

In my judgment the Crown is entitled to the 1250*l.* as bona vacantia, and it should be so declared, and the costs of all parties should come out of the fund.

RIGBY L.J. In this case we have to determine the ownership of a fund of 1250*l.*, the whole remaining property which formerly belonged to a friendly society called the Helston Equitable Annuitant Society. All claims on the society have been satisfied, and the society itself has ceased to exist by reason of the death of all its members.

The learned judge, from whose judgment this appeal has been brought, has held that there is a resulting trust in favour of all members of the society from its commencement, or their personal representatives, in proportion to the respective contributions made by the members. The members of the society might be ordinary and honorary members as afterwards explained.

In the Court below the personal representative of T. H.

Edwards, the last surviving ordinary member, who died in 1878, claimed that he as survivor was entitled to the whole fund; but on the appeal this claim was not urged, and the personal representative of Edwards joined in supporting the judgment of the learned judge in favour of members generally. The last surviving member was an honorary member, Sir R. Vyvyan, who died in 1879. His personal representatives have disclaimed all interest in the fund.

On behalf of the Attorney-General the fund was claimed for the Crown as *bona vacantia*; and as an alternative case—though this, I think, was not before us argued as the main point—it was argued that the fund is a charitable fund and ought to be applied *cy-près* for charitable purposes. I do not feel sure that, if the case had come before me for the first time sitting alone, I should not have held the society a charity. This conclusion, however, would have been founded upon a number of reasons, no one of which would have been conclusive in itself, derived from the special rules of the society, and indications contained in the statutes regulating friendly societies during the existence of this society and now repealed; and I do not think that I ought in such a case to differ from the learned judge in the Court below and my colleagues in this Court, and I say nothing more on the point. [His Lordship then stated the facts, and, after reading the rules of the society, proceeded:—]

The provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56), which appear material for consideration on the question whether there is a resulting trust may be summarized as follows:—

Sect. 3 makes it obligatory on every society established under the Act, before confirmation of the rules by justices as afterwards directed, to declare, by one or more of the rules to be confirmed, all and every the intents and purposes for which the society is intended to be established, and by such rules to direct all and every the uses and purposes to which the money which shall from time to time be subscribed, paid or given to or for the use or benefit of such society, or which shall arise therefrom, or in any wise shall belong to the society, shall be

C. A.
1896
CUNNACK
v.
EDWARDS.
Rigby L.J.

C. A.

1896

CUNNACK

v.

EDWARDS.

Rigby L.J.

appropriated and applied, and in what circumstances any member of the society or other person shall become entitled to any part thereof.

Sect. 8 provides for the rules, when confirmed, becoming binding on the members and officers of the society and the several contributories thereto.

Sect. 26 provides for the dissolution of the society, and, among other things, that it shall not be lawful for the society, by any rule made on the dissolution or determination, to direct the division or distribution of any part of the stock or fund to or amongst the members, other than for carrying into effect the general intents and purposes of the society declared by them and confirmed by the justices.

Sect. 39 provides that the Act is to extend to all friendly societies thereafter to be established, and also to societies already established as soon as they should think fit to conform to it.

The Act of 1829 appears to have remained in force until repealed with other Acts by 13 & 14 Vict. c. 115, but the repealed Acts remained in force, subject to immaterial exceptions, with reference to societies formed under them.

In my judgment there is no resulting trust in the present case on the following grounds. All the contributions of ordinary and honorary members, and all fines and forfeitures, are to go into one common fund. Probably, even if all the accounts of the society from the year 1810 were in existence, it would be impossible to follow the destination of the particular contributions made by each member, or to separate them from the voluntary contributions and funds arising from fines and forfeitures.

All the books of the society up to the year 1850 have, however, been lost, and there is nothing to shew how far the 1250*l.* remaining has been made up of contributions of honorary members, or of fines or forfeitures, or what contributions of ordinary members form part of it. Probably the only safe inference is that the contributions of members, for many years after the establishment of the society, have long ago been entirely expended in payments to widows of former members,

or for other purposes of the society, and that the 1250*l.* contains no part of such earlier contributions.

The members were not *cestuis que trust* of the funds or of any part thereof, but persons who, under contracts or quasi-contracts with the society, secured for valuable consideration certain contingent benefits for their widows which could be enforced by the widows in manner provided by the Acts. Any surplus would, according to the scheme of the rules, be properly used up (under appropriate amendments of the rules) either in payment of larger annuities or in reduction of contributions. It is true that no such alterations were made, and it is now too late so to distribute the funds; but I do not think that such omission can give to the contracting parties any benefit which they did not bargain for.

The rules, which, according to the Act, are to state all the uses of the stock, contain no provision in favour of members.

It is difficult to see why the personal representatives of deceased members should be entitled to any money produced by voluntary contributions, fines and forfeitures, but no doctrine of resulting trust would entitle them.

On the whole, I conclude that there is no resulting trust.

Solicitors: *Hare & Co. ; Robbins, Billing & Co., for Marrack, Nalder & Hocking, Truro.*

G. I. F. C.

C. A.

1896

CUNNACK

v.

EDWARDS.

Rigby L.J.

C. A.

1896

Aug 7⁵, 10.

In re LUMLEY.
Ex parte HOOD BARRS.

[1892 L. 518.]

*Married Woman—Separate Use—Restraint on Anticipation—Married Women's
Property Act, 1882 (45 & 46 Vict. c. 75).*

A restraint on anticipation may, in a settlement made since the Married Women's Property Act, 1882, came into operation, be effectually annexed to a life estate thereby given to her, though not in terms limited to her separate use, and only made separate estate by force of the Act.

Such restraint is not invalidated by the life estate being given without impeachment of waste.

THIS was an appeal by Mr. Hood Barrs from an order of North J. refusing a motion of which notice was given on June 8, 1896, that a receiver might be appointed of the rents then due and in arrear to Mrs. Cathcart arising from certain real estates at Wootton and Stourbridge, by way of equitable execution of orders made in this matter, directing payment of costs by Mrs. Cathcart to the applicant.

The orders by which costs were directed to be paid by Mrs. Cathcart to Mr. Hood Barrs were dated respectively November 4, 1893, December 9, 1893, June 27, 1894, and August 2, 1894.

The real estates in question were by an ante-nuptial settlement, dated July 19, 1887, limited to the use of Mrs. Cathcart (then Mary Unwin) in fee simple until the then intended marriage should be solemnized, and after the solemnization thereof "to the use of the said Mary Unwin during her life without impeachment of waste and without power of anticipation," with divers remainders over.

The rents of which it was now sought to obtain a receiver accrued due on March 25, 1896. North J. refused the motion with costs to be set off against the costs due from Mrs. Cathcart to the applicant.

Mr. Hood Barrs appealed.

The appellant in person. There is no valid restraint on

anticipation, the property not being limited to Mrs. Cathcart's separate use. The restraint is a mere incident of the separate use, and has no independent existence: *Stogdon v. Lee* (1); see observations of Fry L.J. (2); *Tullett v. Armstrong*. (3) Separate use cannot be implied from a restraint on anticipation. Then it is said that the Married Women's Property Act, 1882, creates a separate estate in the property. But under that Act a married woman's property is made separate property in the same manner as if she were a feme sole. She stands, therefore, as to property in the same condition as a man, and cannot withdraw her property from her creditors by a restraint on anticipation any more than a man can do so. Sect. 19 of the Act leaves a restraint on anticipation where it was before; it does not give effect to it where it would have had no effect apart from the Act, or authorize the annexing of it to a married woman's estate in any way in which it could not be done before. [*Symonds v. Wilkes* (4) was referred to.] Then the words allowing Mrs. Cathcart to commit waste are inconsistent with the words restraining anticipation, and, being precedent to them, must prevail over them: *Cope v. Cope*. (5) Part of this property is a mining property, and the authority to commit waste enables Mrs. Cathcart to take away part of the corpus of the property. In *Clive v. Clive* (6) James L.J. treats a power to commit waste as inconsistent with a restraint on anticipation.

But supposing there is a valid restraint on anticipation, I contend that rents which became due before the application for equitable execution can be attached: *Cox v. Bennett*. (7) The decision in *Hood Barrs v. Cathcart* (8), that rents not due when the judgment was given against the married woman cannot be attached, was overruled by the House of Lords in *Hood Barrs v. Heriot* (9), and the income in the present case, though it became due after the orders under which the costs

C. A.

1896

In re

LUMLEY.

Ex parte
HOOD BARRS.

(1) [1891] 1 Q. B. 661.

(2) Ibid. 670.

(3) 1 Beav. 1.

(4) 13 W. R. 1026.

(5) 15 Sim. 118, 126; Shep. Touch. 88.

(6) L. R. 7 Ch. 433.

(7) [1891] 1 Ch. 617, 623.

(8) [1894] 2 Q. B. 559.

(9) [1896] A. C. 174.

C. A. are payable, can be made available by the appointment of a receiver, as it has accrued due before the application to enforce the order.

1896

In re

LUMLEY.

Ex parte
HOOD BARRS.

Willoughby Williams, for Mrs. Cathcart. The last point is disposed of by the judgment of the Court of Appeal in *Whiteley v. Edwards* (1), where it was decided that when there is a restraint on anticipation, a judgment cannot be enforced against arrears of income accruing due after its date, and that *Hood Barrs v. Heriot* (2) does not affect *Hood Barrs v. Cathcart*. (3)

As to the question whether a restraint on anticipation can be attached to an estate which is not limited to the separate use of the married woman, but is only made separate property by the Married Women's Property Act, the point was discussed before the Court of Appeal, in *Hood Barrs v. Cathcart* (July 23, 1894 (4)), and Kay L.J. gave a decision which I will read at length. (5) His Lordship is clear that a restraint on anticipation can be attached to property which is made separate estate only by the Act. The books on conveyancing, published shortly after the passing of the Act, relied on the

(1) [1896] 2 Q. B. 48.

(2) [1896] A. C. 174.

(3) [1894] 2 Q. B. 559.

(4) Not reported.

(5) Kay L.J., after dealing with another point, proceeded as follows:—

“It has been argued that this never was money as to which there was a restraint on anticipation. I utterly disagree with the argument from one point to another. By the marriage settlement of this lady, which was executed in 1887 at a time when the Married Women's Property Act applied, she was entitled at law for her separate use for life to all the real estate of which she had been the absolute owner. This settlement was made on the occasion of that marriage, and added to that separate use the usual restraint on anticipation. We have been entertained with what seems

to me a most absurd argument: that to that separate use, because it was a legal separate use created by the Act, the restraint on anticipation cannot be affixed. We have only to look at the Act of Parliament to see that it contemplates that there should be affixed to that legal separate use a restraint on anticipation, because s. 19 refers to the very thing itself, and points out that nothing in the Act of Parliament was intended to affect or interfere with the restraint on anticipation contained in a settlement made either before or after the Act: those words are express. Therefore that argument is a perfectly impossible argument to any one who studies the Act of Parliament, and to any one who has the slightest pretensions to be a lawyer.”

Act, and omitted the limitation to the separate use ; but afterwards they reverted to the old form. There is no difference between property settled to a married woman's separate use and property which is made her separate estate by the Act : *In re Armstrong*. (1)

As to the life estate being without impeachment of waste, there is no doubt a rule that if two clauses in a deed are inconsistent the first prevails ; but the Court looks to the whole instrument, and does not resort to that rule except in a case of necessity. Here the restraint on anticipation is the principal thing. If there is an inconsistency it only affects waste, and does not affect my position as to the rents. But there really is no inconsistency—the tenant for life may commit waste, but cannot do it by way of anticipation : thus, for instance, she cannot give anything in the nature of a mining lease which would authorize the lessee to commit future waste. In Davidson's Precedents, 3rd ed. vol. 3, p. 1195, and Key and Elphinstone's Precedents, 4th ed. vol. 2, p. 613, are clauses similar to the present, with a restraint on anticipation annexed to a life estate without impeachment of waste.

Mr. Hood Barrs, in reply.

Cur. adv. vult.

Aug. 10. LINDLEY L.J. Mr. Hood Barrs seeks to enforce an order for costs against rents which became due to Mrs. Cathcart since the order was made. North J. has decided that he is not entitled to do this, because the property from which the rents accrue was settled on Mrs. Cathcart without power of anticipation. Mr. Hood Barrs has appealed—first, upon the ground that the restraint against anticipation is invalid ; and, secondly, upon the ground that, even if it is valid, he can reach the rents now that they are in arrear. That he cannot reach them if Mrs. Cathcart is effectually restrained from anticipation is now settled by the decisions of the Court of Appeal in *Hood Barrs v. Cathcart* (2) and *Whiteley v. Edwards*. (3) These decisions are in no way opposed to *Hood Barrs v. Heriot* (4),

(1) 21 Q. B. D. 264.

(2) [1894] 2 Q. B. 559.

(3) [1896] 2 Q. B. 48.

(4) [1896] A. C. 174.

C. A.
1896
In re
LUMLEY.
Ex parte
HOOD BARRS.

C. A.
1896
~~~~~  
*In re*  
LUMLEY.  
*Ex parte*  
HOOD BARRS.  
~~~~~  
Lindley L.J.

but are quite consistent with it. They are, I admit, opposed to some remarks of my own in *Cox v. Bennett* (1) ; but they are not opposed to the decision in that case, which was approved by the House of Lords in *Hood Barrs v. Heriot*. (2) *Whiteley v. Edwards* (3), which was decided after *Hood Barrs v. Heriot* (2), is conclusive on this point.

The question whether the restraint against anticipation in Mrs. Cathcart's marriage settlement is valid or not, is also, in my opinion, settled by the decision of the Court of Appeal in *Hood Barrs v. Cathcart*, on July 23, 1894, a report of which has been furnished to us by Mr. Hood Barrs. In that case he urged the argument which he has addressed to us on the present occasion, and the Court decided against him. The Master of the Rolls and A. L. Smith L.J. considered the point not open after the previous decision in *Hood Barrs v. Cathcart* (4) ; but Kay L.J. shewed that the argument was inconsistent with s. 19 of the Married Women's Property Act, 1882. It may be that the validity of the restraint against anticipation had previously been assumed, and not decided ; but it was distinctly raised and decided on July 23, 1894. Having, however, looked into the matter myself before I had satisfied myself that the point had been already actually decided, I will state that, in my opinion, Mr. Hood Barrs' argument is quite untenable. The omission of the words "for her separate use," which would have been fatal if the case did not fall within the Act of 1882 (see *Stogdon v. Lee* (5)), is not so if that Act applies, as it clearly does. By ss. 1 and 2 of the Act the property settled became Mrs. Cathcart's separate property, although the words "for her separate use" were not inserted in the settlement ; and, as the settlement did restrain her from anticipation, that restraint became operative by s. 19. The attempt to draw a distinction between the separate property of a married woman and property settled on her for her separate use has been made before, and made in vain : see *In re Armstrong*. (6) That case also shews that "affect" in s. 19 means "invalidate" or "render inopera-

(1) [1891] 1 Ch. 617, 623.

(2) [1896] A. C. 174.

(3) [1896] 2 Q. B. 48.

(4) [1894] 2 Q. B. 559.

(5) [1891] 1 Q. B. 661.

(6) 21 Q. B. D. 264.

tive." As to the introduction of the words "without impeachment of waste," they might perhaps create a difficulty if we were dealing with a case of waste, although I doubt whether they would even then ; but we are not dealing with such a case. The appeal must be dismissed with costs.

C. A.
1896
~
In re
LUMLEY.
Ex parte
HOOD BARRS.

LOPES L.J. I am of the same opinion. As regards the restraint on anticipation, it is said that that restraint is inoperative because it is not preceded by the words "for her separate use." Now, whatever the state of things might have been, or whatever the authorities may have been in support of that contention before the Married Women's Property Act, 1882, I think any such contention can no longer be maintained, because, in my judgment, the Act supplies the words "for her separate use"; and when those words are supplied, the restraint against anticipation attaches. With regard to the rents in arrear, I say nothing beyond what has been said by my Lord on the present occasion ; and I think, as I have said on previous occasions, that that matter has been determined by the case in the House of Lords.

Then it is said that the gift being a gift without impeachment of waste, that is repugnant to any restraint on anticipation. I am clearly of opinion that that contention cannot be maintained ; it may be good as far as waste is concerned, but it cannot be good any further. I have had the opportunity of seeing the judgment given by my brother Lindley, and I think it is the right one in the case.

Solicitors : *Hood Barrs ; Edward H. Quicke.*

H. C. J.

C. A. ATTORNEY-GENERAL *v.* ALBANY HOTEL COMPANY.

1896

[1896 A. 873.]

NORTH J.

July 31; *Practice—Crown, Action on behalf of—Interlocutory Injunction—Attorney-General—Undertaking in Damages.*
 Aug. 1, 4.

C. A.

Aug. 10.

In granting an interlocutory injunction at the instance of the Attorney-General on behalf of the Crown, the Court will not, as a general rule, require the Attorney-General to give the undertaking in damages usually required from an ordinary plaintiff as a condition of his obtaining such an injunction.

Decision of North J. affirmed.

MOTION by the plaintiff, the Attorney-General, suing on behalf of Her Majesty, for an order that the defendant company might be restrained, until the trial of the action or further order, from using or permitting the premises Nos. 9, 10, 11 and 12, Robertson Terrace, Hastings, or any part thereof, to be used for the sale by retail of wine, beer, spirits, or any other intoxicating liquor thereon, and from in any manner using the said premises, or permitting the same to be used, contrary to the covenants in that behalf contained in the lease of the premises, dated March 9, 1853, granted by the Crown to Patrick Francis Robertson.

July 31. *Sir R. E. Webster, A.-G., and Vaughan Hawkins,* for the plaintiff.

Swinfen Eady, Q.C., and Ingpen, for the defendants. The injunction ought not to be granted; but if it is granted the ordinary undertaking as to damages should be given by or on behalf of the plaintiff. Such an undertaking should be required even when the action is on behalf of the Crown: *Secretary of State for War v. Chubb*. (1)

Sir R. E. Webster, A.-G., in reply. It is contrary to the settled practice to require such an undertaking in an action on behalf of the Crown. I have known many such actions in which an interlocutory injunction has been granted without any undertaking as to damages.

(1) 43 L. T. (N.S.) 83.

NORTH J. Upon the merits I think the injunction ought to go. But the case may be mentioned again to-morrow upon the question of the undertaking.

Sir R. E. Webster, A.-G., and Vaughan Hawkins, for the plaintiff. The report of *Secretary of State for War v. Chubb* (1) is not quite accurate, as appears by the shorthand writer's notes of the proceedings. The Secretary of State was not there suing on behalf of the Crown, but he had been by statute created a corporation for the purpose of the land to which the action related, and he was suing in respect of his right of property. It was admitted that the Crown could not be required to give an undertaking as to damages. That case, therefore, is not any authority for requiring an undertaking on behalf of the Crown, and it has never since been acted on as such. The point has arisen in other cases in which the Attorney-General has been suing on behalf of the Crown, and in none of those cases was the giving of an undertaking by or on behalf of the plaintiff made a condition of the granting of an interlocutory injunction, but the orders were drawn up without any such undertaking. These cases are not reported, but there are shorthand notes of the proceedings: *Attorney-General v. Leonard*, before Chitty J., April 13, 1888; *Attorney-General v. South Eastern Ry. Co.*, before Kay J., July 5, 1882; *Attorney-General v. Morgan*, before North J., April 27, 1888. In the latter case the registrar in drawing up the order inserted the usual undertaking as to damages; but the judge afterwards, on application by the plaintiff, ordered the undertaking to be struck out. In *Attorney-General v. Moore* (2) Stirling J. treated it as settled law that an undertaking as to damages would not be required in an action on behalf of the Crown. The practice of requiring this undertaking to be given on the granting of an interlocutory injunction is a comparatively recent one; in the first instance the undertaking was required only in ex parte injunctions, though now it is always required on the granting of an interlocutory injunction when ordinary persons are plaintiffs. The Crown is

C. A.

1896

ATTORNEY-
GENERAL

v.

ALBANY
HOTEL
COMPANY.
—

(1) 43 L. T. (N.S.) 83.

(2) [1893] 1 Ch. 676, 682, 685.

C. A.

1896

ATTORNEY-
GENERAL
v.ALBANY
HOTEL
COMPANY.

not liable in damages in the ordinary way ; the only mode of obtaining relief against the Crown is by a petition of right. The Court will not interfere with the rights of the Crown, and will grant the injunction without the undertaking.

Swinfen Eady, Q.C., and *Ingpen*, for the defendants. In none of the cases to which the Attorney-General has referred was the point decided in favour of the Crown after argument. The practice is that the undertaking shall be inserted as a matter of course in an order for an interlocutory injunction. If the defendants' trade is continued until the trial of the action no injury will be done to the Crown ; whereas if the trade is stopped, and it should turn out that the defendants are in the right, they will have been seriously injured by the interlocutory injunction. An undertaking as to damages ought, therefore, to be given on behalf of the plaintiff by some substantial person. The undertaking is needed for the very reason that damages cannot be recovered against the Crown. The principle is that when a plaintiff is asking the Court to do that which may be a wrong, and which cannot be done without an order of the Court, he ought to undertake to be answerable in damages to the defendant in case a wrong is done. If the practice is established that the Attorney-General cannot be required to give an undertaking in damages, it may be an instrument of great oppression. In *Secretary of State for War v. Chubb* (1) the question was whether the Secretary of State could give an undertaking ; and it was held that, being a corporation, he could. Though the property was vested in him as a corporation, it was vested in him as an officer of the Crown. The case is not an authority that the Crown can obtain an interlocutory injunction without giving an undertaking as to damages. In *Attorney-General v. Leonard* the point was not pressed, and indeed in the first instance Chitty J. suggested that the ordinary undertaking might be given ; but the counsel for the Crown said that the Crown would not undertake. Then Chitty J. said, " It may be the Crown is in a worse position "—by which he must have meant that, if the Crown would not give the undertaking, possibly it could not obtain an interlocutory injunction.

(1) 43 L. T. (N.S.) 83.

At any rate, the defendants' counsel did not press for the undertaking. In *Attorney-General v. South Eastern Ry. Co.* the point was not argued. The form of order was arranged. Kay J. only said that the Crown could not undertake. The point, whether the interlocutory injunction would be granted unless the Crown provided some one to give the undertaking on its behalf, was not raised. In *Attorney-General v. Moore* (1) no case was cited in which the point had been argued.

C. A.
1896
ATTORNEY-
GENERAL
v.
ALBANY
HOTEL
COMPANY.

NORTH J. I think it is quite clear that in the present case the order for an interlocutory injunction must go, notwithstanding that the plaintiff declines to give an undertaking as to damages. But, as the point is an important one, I will give my reasons in writing on Tuesday next (August 4).

Aug. 4. The following judgment was read by

NORTH J. The question upon which I have now to give my decision is, whether the usual rule of the Court, that an applicant for an interlocutory injunction must give an undertaking to be answerable in damages as a condition of his obtaining the injunction, applies when the Attorney-General is the plaintiff, suing on behalf of the Crown. This rule is one of comparatively recent introduction, and its history is given by Sir George Jessel in *Smith v. Day* (2), though the subsequent decision of the Court of Appeal in *Griffith v. Blake* (3) shews that it is not of such limited application as is there stated. The insertion of such an undertaking has now become a matter of course; and James L.J. in *Graham v. Campbell* (4) said that the undertaking in damages ought to be given on every interlocutory injunction, and, unless under special circumstances, effect ought to be given to it. If it should subsequently appear that such an order had been improvidently made, it is difficult to see how, in the absence of such an undertaking, the defendant could recover from the plaintiff the damages which were really sustained by him by reason of the improper order of the Court. Upon drawing up an order for

(1) [1893] 1 Ch. 676.

(2) 21 Ch. D. 421.

(3) 27 Ch. D. 474.

(4) 7 Ch. D. 490.

C. A.
1896
ATTORNEY-
GENERAL
v.
ALBANY
HOTEL
COMPANY.
North J.

an interlocutory injunction the registrar invariably inserts such an undertaking on the part of the plaintiff, even though, as frequently happens, it has not been mentioned in court, but has been taken for granted. Of course such an undertaking must be voluntary: the Court cannot compel a person to give an undertaking; and, if the plaintiff declines to give it, either in court or before the registrar, the order will not be made, or, if pronounced, will not be drawn up. If in the exercise of his discretion a judge should think fit to dispense with such an undertaking he could of course do so, and there are cases in which judges have done so; but this would only be under special circumstances. In the absence of any express direction of the judge to the contrary, the undertaking will always be inserted in the order. Then is the Crown an exception to this general rule? And is it the practice of the Court to abstain from imposing, when an action is by the Attorney-General on behalf of the Crown, a condition which it would impose if the plaintiff in the action were any other person? The only decision reported upon the point seems to be the *Secretary of State for War v. Chubb* in 1880; and that is reported only in 43 L. T. (N.S.) 83. I have the shorthand notes of the case before me, and Jessel M.R. refused to make any order unless the undertaking was given. It is not very easy to understand upon what grounds that case was so decided. The defendant's counsel admitted that he could not have asked for damages from the Crown, and claimed them upon the ground that the plaintiff was not the Crown but the Secretary of State for War, who was expressly made a corporation, and the reason given by the Master of the Rolls was that he ought not to make any distinction between a case in which the Secretary of State was suing in respect of his right of property and the case of any "other individual"—a curious phrase to use of the Crown, if that was what he meant. But, assuming that case to go the whole length contended for, it seems to me to stand alone. It was not founded on any previous decision, and no later decision has followed it. In *Attorney-General v. South Eastern Ry. Co.* in 1882—commonly known as the Channel Tunnel case (the shorthand notes of which are before me, for the

case is not reported)—Mr. Benjamin and Mr. Davey, the counsel for the defendants, stated to the Court that they had advised their clients that they could not ask for an undertaking in damages against the Crown; upon which Kay J. remarked, “The Crown does not undertake,” and the order for the injunction omits the undertaking. A similar question arose in 1888 in *Attorney-General v. Leonard*, a shorthand note of which is also before me; and there Chitty J. suggested that the undertaking of the Crown in damages would be a very good one; but, on its being pointed out by counsel that the Crown did not give any undertaking, the learned judge acquiesced in that view, and the order was drawn up without any such undertaking. A few days afterwards I granted an injunction *ex parte* in *Attorney-General v. Morgan*, and Mr. Registrar Pemberton—this is a point in the defendants’ favour—handed out the draft of the order with the undertaking inserted. The Attorney-General objected, and the matter was mentioned to me—I take this from Mr. Vaughan Hawkins, who was counsel for the Crown; I have no personal recollection of it—and I directed that the undertaking should be omitted from the order, the draft of which I have now before me, with the alteration initialled by Mr. Registrar Pemberton. I attach no weight to this case; the defendant was not present on the application; but in directing the omission of the undertaking I was acting on what I believe from about forty years’ experience to have been the ordinary practice of the Court. Again, in *Attorney-General v. Moore* (1) the then Solicitor-General (Sir John Rigby) said (2): “In this case there will be no undertaking in damages. I take that to be settled as applying to the Crown”; to which Stirling J. replied, “The authorities are to that effect, I think.” This I consider of great authority, as the statement to the Court as to the practice in Crown cases was made by a law officer specially well informed as to that practice, from the fact that he had for several years filled the office of junior counsel in Equity to the Treasury, confirmed by a judge who also had the additional experience of having himself for several years filled the same

C. A.
1896
ATTORNEY-
GENERAL
v.
ALBANY
HOTEL
COMPANY.
North J.

(1) [1893] 1 Ch. 676.

(2) [1893] 1 Ch. 685.

C. A.
1896
ATTORNEY-
GENERAL
v.
ALBANY
HOTEL
COMPANY.
North J.
—

post. In addition to all this, the present Attorney-General informs me that he has on several occasions obtained interlocutory injunctions without any undertaking being inserted in the orders, and the absence of any printed reports of such cases is of no importance. One observation I desire to add. In considering whether an interlocutory injunction should be granted or not, at a time when the case is only in an early stage of development, the Court aims at keeping matters in statu quo, as far as possible, without prejudicing the rights of the parties; and it is often induced to make in favour of a plaintiff, in the belief that the defendant will be sufficiently protected against damage by the undertaking, an order which the Court would not have made if the defendant had been left without such a protection and there was a reasonable probability that he might sustain serious damage if the injunction should be ultimately discharged. This is a risk which a plaintiff who refuses to give an undertaking must run, and even the Crown may find an injunction refused by the Court when the defendant might be exposed to serious injury if the interlocutory injunction was granted, but not made perpetual, and no protection against that injury was forthcoming. I was again pressed on Saturday to reconsider my decision of the previous day that the injunction should go, subject to the question of the undertaking, upon the ground that this was such a case as I have just suggested. I do not think it is, for the reasons I have already given. I will not go through them again, but I will add that the circumstances of the present case—the fact that a perpetual injunction in respect of identical acts, under the same covenant, has already been granted against Mr. Baker, who is a director of the defendant company, the repeated subsequent applications by him and the defendants to the Crown for a licence to do such acts, and the uniform refusal by the Crown of such permission, evidenced by written documents still in existence, coupled with the unexplained absence of any affidavit by that gentleman on the present occasion—are in my opinion conclusive to shew that there is no reasonable probability that the defendants will be able to make out any such case of acquies-

cence or waiver as is suggested, and that there is no risk against which the defendants require the protection of an undertaking.

W. L. C.

The defendants appealed.

The appeal was heard on August 10, 1896.

Swinfen Eady, Q.C., and *Ingpen*, for the defendants, urged the same arguments as in the Court below.

Sir R. E. Webster, A.-G., and *Vaughan Hawkins*, for the plaintiff, the Attorney-General, were not called upon.

LINDLEY L.J., after stating that in his opinion the plaintiff, the Attorney-General, suing on behalf of Her Majesty, was, upon the evidence, clearly entitled to an interlocutory injunction, continued:—The question then raised before us is this: Is it in accordance with the practice to compel the Attorney-General, on obtaining an interlocutory injunction, to submit to the condition of giving an undertaking as to damages? The practice is, in my opinion, settled in the negative. Of course, if the case presented to the Court on the motion for injunction were doubtful, the Court might say, even to the Attorney-General, “We shall not grant you an injunction”; and if the case were very near the line, the Court might say, “If you like to give an undertaking, or find somebody to do so, we will then grant an injunction.” That is possible. But if the case for an injunction is sufficiently plain, as, in my opinion, this is, the practice is entirely against imposing any such condition. This condition was imposed in *ex parte* cases long before my time; but I never heard of such a condition being imposed upon the Attorney-General in the case of an *ex parte* injunction. In my time the practice was extended to interim injunctions on notice. I recollect the introduction of the practice myself some thirty-five or thirty-six years ago; but still the condition has never been imposed on the Attorney-General. If the Crown’s case is too doubtful, the Attorney-General is not entitled to an injunction at all: that is the answer to the defendants’ contention. I think the appeal must be dismissed, and dismissed with costs.

C. A.

1896

ATTORNEY-
GENERAL

v.

ALBANY
HOTEL
COMPANY.

C. A.

C. A.
1896
ATTORNEY-
GENERAL
v.
ALBANY
HOTEL
COMPANY.
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LOPES L.J. I am of the same opinion. If this were an ordinary lessor, having regard to the circumstances of the case, I cannot for a moment doubt that an injunction would have been granted; and it would have been granted, as has been said, with the usual undertaking in damages. In this case the party asking for the injunction is Her Majesty by her law officer, the Attorney-General, and a question arises whether an undertaking can be required in a case of this kind. Now it seems to me, according to the cases brought to our notice, that the inveterate practice has been not to direct such an undertaking: certainly, in my own experience, I never heard of an undertaking of that kind given when the Queen sues by her Attorney-General. I think the case referred to, *Secretary of State for War v. Chubb* (1), where the Secretary of State for War was the person applying for an injunction, was rather different, and may be distinguished from the present case on the ground that it was the Secretary of State who was the plaintiff on the record, and not Her Majesty the Queen suing by her Attorney-General. I think, therefore, this appeal must be dismissed.

Solicitors: *Leggatt, Rubinstein & Co.*; Solicitor, *Office of Woods, &c.*

(1) 43 L. T. (N.S.) 83.

G. I. F. C.

In re DELLWICK'S PATENT.

CHITTY J.

[1896 D. 065.]

1896
July 31.

Patent—Practice—Amendment of Specification—Petition for Revocation pending—Application for Leave to Amend—Discretion of Court—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 19.

The granting or refusing leave to apply to amend a specification by way of disclaimer, under s. 19 of the Patents Act, 1883, is still a matter for the judicial discretion of the Court, and this discretion has been in no way interfered with by *Moser v. Marsden* (13 Rep. Pat. Cas. 24) and *Deeley v. Perkes* ([1896] A. C. 496).

MOTION.

In February, 1890, Letters Patent, No. 2110, were granted to one Carl Dellwick, for improvements in the process of heating incandescents for use with gas lamps or burners.

In May, 1896, the Incandescent Gas Light Company, Limited, presented a petition for the revocation of this patent.

The New Incandescent (Sunlight Patent) Gas Lighting Company, Limited, the assignees and present owners of Dellwick's patent, now moved for liberty to apply at the Patent Office for leave to amend the specification by way of disclaimer, and that the hearing of the petition for revocation might be postponed until after such amendment.

The petitioners opposed the application, and filed an affidavit shewing the nature and extent of the proposed disclaimer, and generally discussing the merits of the question.

An action for infringement by the petitioners against the then owners of Dellwick's patent had been tried before Wills J. in March and April last; this action had been dismissed: see *Incandescent Gas Light Co. v. Sunlight Incandescent Gas Lamp Co.* (1)

Byrne, Q.C., Bousfield, Q.C., Wallace, Q.C., and C. E. E. Jenkins, for the motion.

Moulton, Q.C., Terrell, Q.C., and A. J. Walter, for the petitioners. Leave ought not to be given at the present stage of

CHITTY J. the petition. The question of disclaimer ought now to be reserved until the hearing of the petition, when the merits of the patent and the nature of the proposed disclaimer can be properly ascertained. When a specification has once been amended, the regularity of the amendment cannot now be questioned: *Moser v. Marsden* (1); and a disclaimer is now final for all purposes. Having regard, too, to the decision of *Deeley v. Perkes* (2), that where the Court holds some claim in a specification to be good, an order for the revocation of a patent will be withheld for a time, so as to enable the patentee to apply to amend by disclaiming all the claims except the good one, the Court ought to leave this application to be dealt with at the hearing of the petition for revocation. These two recent decisions have entirely altered the status of disclaimers, and have altered the former practice as to granting leave to apply to disclaim. In effect they take away or largely alter the exercise of the Court's discretion under s. 19.

1896
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*In re*  
 DELLWICK'S  
 PATENT.  
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The trial before the comptroller and the law officer, on the question of disclaimer, cannot be so complete or so satisfactory as a trial before the Court. The affidavit shews that the amendments and disclaimer proposed are manifestly bad. For these reasons, we contend that leave to apply to disclaim ought not to be given till after the petition for revocation has been heard.

*Bousfield, Q.C.*, in reply. This is simply a question for the discretion of the Court. Applications of this kind have been invariably allowed. *Moser v. Marsden* (1) and *Deeley v. Perkes* (2) have in no way altered the former practice. A similar application was made and allowed by this same Court in *Re Deeley's Patent*. (3) There is, as stated by Wills J., a certain amount of nonsense in this specification, and we want now to get rid of it by disclaimer.

CHITTY J. Unquestionably the 19th section of the Patents Act, 1883, confers a discretion upon the Court or a judge, and, like all discretions, it has to be exercised judicially. The

(1) 13 Rep. Pat. Cas. 24.

(2) [1896] A. C. 496.

(3) 11 Rep. Pat. Cas. 72.



19th section has to be contrasted with the 18th, which provides that where there is no action for infringement of a patent, and no proceeding for revocation pending, the patentee can, without obtaining any leave, apply to the authority which the Legislature, by the 18th section, has constituted as the competent authority, to have his specification amended. The authority is the comptroller and the law officer, the law officer being the person before whom all applications for patents originally came, and by whom they are passed when the patent is allowed; but where there is an action pending, the Legislature foresaw that it would not be right to give the same general liberty to the patentee, and, therefore, confided the discretion to the Court or a judge, particularly pointing out certain matters in reference to which the discretion is to be exercised, namely, "subject to such terms as to costs and otherwise as the Court or a judge may impose." It would be obviously unjust that a patentee should, after a petition for a revocation has been presented, be entitled of his own motion to go to the constituted authority and ask for the amendments which he thinks fit to put forward. The section, as I have said, leaves the application entirely to the discretion of the Court or the judge. Now, according to the course hitherto adopted, the Court has usually allowed these applications imposing proper terms within the meaning of the 19th section. I have had before me counsel of very great experience in the law of patents, and not one of them has been able to say that in any case which has occurred within his particular experience has the Court or a judge ever refused to grant leave. But it is said that in consequence of two decisions of the House of Lords—one *Deeley v. Perkes* (1), and the other *Moser v. Marsden* (2)—the course that has hitherto been pursued ought to be modified, because these two decisions have so altered the law with respect to amendments of the specification, that the Court ought now to let the application stand to the trial of the action where there is one for infringement, or to the hearing of the petition where it is for revocation. In my opinion, these decisions, even if they have made the alterations contended for in the

CHITTY J.

1896

In re

DELLWICK'S  
PATENT.

(1) [1896] A. C. 496.

(2) 13 Rep. Pat. Cas. 24.

CHITTY J. law, have not obviously taken away the discretion of the Court conferred by s. 19, and I do not think that they have imposed any new rule which should fetter that discretion. I have protested on many occasions, where discretion is given to the Court, against the idea that a discretion becomes fixed by the exercise of the discretion by a particular judge in a particular case. Observations have fallen from me to that effect which have been strongly approved of in the Court of Appeal. I consider, therefore, that I am free to act upon what I take to be a proper exercise of the judicial discretion in this case.

1896

*In re*DELLWICK'S  
PATENT.  
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An affidavit has been filed on the part of the petitioners, objecting on certain grounds to the amendments proposed in the specification on the part of the applicants, and it appears to me that what I am asked to do by the arguments which have been founded upon that affidavit is, to grant a kind of preliminary trial with reference to the question whether the amendments ought or ought not to be allowed, and to do so upon vague and insufficient materials. Now, if I saw that this was plainly a trumpery case on the part of the applicants, and I considered that it would be an improper exercise of my discretion, I should say so, and decline to give the leave; but I cannot, speaking personally, conceive anything more inconsistent with a true and just result than a partial discussion, on a mere application of this kind, of the merits of the patent as it originally stood, and of the merits of the amendments that are put forward. It is impossible for the Court on such materials as I have before me to pronounce any opinion whether the amendments should be allowed or not. The Court has no jurisdiction on this question of amending a patent, either under the 18th section or pursuant to the leave granted under the 19th section. The Legislature has entrusted those questions to a distinct authority. The Court would be usurping that authority if it attempted in any way to exercise it. I have heard Mr. Moulton's and Mr. Terrell's arguments, which, in my opinion would have been proper to address to the Legislature at the time the Act was being passed, that the tribunal under the 18th section is not a satisfactory tribunal, and is not as good a tribunal as the Court, because—this is one of the

great arguments—when the witnesses get before the comptroller and the law officer the investigation of the question stands within narrow limits in regard to cross-examination and the like, and moreover there is no appeal. But these are observations which ought to have been addressed to the Legislature, and I take the statute as I find it, and say that that is the tribunal to which the Legislature has remitted questions of this sort. Now, the strange part of the opposition, which has been very strenuous, to this application is that it is founded upon the argument that the amendments proposed obviously cannot be allowed. If that be true, the question will be a very easy one for the comptroller and the law officer to decide; but, I think, following that argument would draw me away from the principle upon which I propose to found this decision. I think I can look into the matter to the extent of satisfying myself that it is not a trumpery or a trifling application; but beyond that I ought not to go, and beyond saying that it is a fair and proper case I ought not by any words that may fall from me to prejudice the application which may be made to the comptroller and the law officer. I do as I did in *Re Deeley's Patent* (1)—I pronounce no opinion whatever upon the objections which are presented to me at the Bar by the affidavit as to the amendments. If I acceded to this opposition I should have to let this application stand to the trial, and assuming (I leave, of course, the matter entirely open) that the assignee of the patents should succeed in obtaining an amendment of the specification by way of disclaimer, I should probably postpone his obtaining that statutory indulgence for a year or so to come, and in the meantime he would be in possession of a patent which, on his own shewing and on his own admission, is invalid. His object is to cut down his specification by way of disclaimer to an extent which he says he can sustain before the comptroller and the law officer, and I should, if I acceded to the arguments for the opponents, send him to trial bound hand and foot so far as his specification as it at present stands is concerned. But Mr. Terrell said, Let it be sent to trial or the hearing of the petition with the acknowledgment that he makes

CHITTY J.

1896

In re

DELLWICK'S  
PATENT.

(1) 11 Rep. Pat. Cas. 76.

CHITTY J. by the present application, and let the Court then find out whether there is anything in his specification which can be sustained—whether he has got what I may term a remnant of an invention. It appears to me that one of the objects of the 19th section was to prevent the unnecessary expense which is always great in these patent actions; and though I think it can be done at the trial, and although at the trial, according to the House of Lords decision in *Deeley v. Perkes* (1), the Court is not bound absolutely to pronounce for the revocation, it can say, “Revocation unless amendment within some limited time.” I do not see that it would be a proper exercise of my discretion to force the respondents, who admit that their patent cannot be sustained as it now is, to go to a trial a large portion of which would be quite unnecessary. Now, Wills J.’s decision has been referred to. That seems to me not to be adverse to the present application. If Wills J. held that Dellwick’s patent was absolutely void from beginning to end, then I should have had a different case to deal with; but using the language of the witnesses and the language, unless I am mistaken, as it fell from him, which is quite appropriate to the case, he said in substance—I do not give the exact words—there was much nonsense—there was much rubbish in Dellwick’s patent. The counsel who are asking for leave to bring this matter before the comptroller or the law officer admit that; and, following that decision, they say that there is rubbish—there is nonsense in this specification, and they ask consequently to excise a very large portion of it. Whether what they propose to leave in will or will not be an invention within the proper scope of the patent, is a matter that I consider I ought not to pronounce any opinion upon. The result, therefore, is that I give leave to apply at the Patent Office, but upon the proper terms in regard to costs. The petition will accordingly stand over pending the result of the application to amend.

[*Terrell, Q.C.*, subsequently asked for leave to appeal, which was refused.]

Solicitors: *Hugh C. Godfray; Faithfull & Owen.*



*In re* WINTLE.  
TUCKER *v.* WINTLE.

[1896 W. 506.]

NORTH J.

1896

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 July 29, 30.

*Will—Construction—Gift to a Class at Twenty-one—Maintenance—Vesting.*

A power given by will to trustees to apply “the whole or such part as they shall think fit” of the income of the respective shares of members of a class entitled to shares of property on attaining twenty-one:—

*Held*, not to vest the shares of members under twenty-one.

*Fox v. Fox* (L. R. 19 Eq. 286) dissented from.

THIS was an originating summons to determine questions in relation to the construction of the will of George Wintle, who died March 14, 1880, the plaintiffs being the trustees of the will, the defendants beneficiaries. After a devise and bequest of his residuary estate on trust for his wife for life, the testator’s will proceeded: “and from and after the decease of my said wife upon trust to pay and divide the whole of my said residuary estate unto and equally between all my children (if more than one as or in the nature of tenants in common), or unto my child if only one, and the issue of any of them who may have previously died (such last-named issue to take their parent’s share) for their respective sole and separate use and benefit absolutely upon their respectively attaining the age of twenty-one years. I empower the trustees or trustee for the time being of this my will (after the decease of my said wife) to apply the whole or such part as they or he shall think fit of the annual income of the share or presumptive share of any of my children or grandchildren during minority for or towards his, her or their education or maintenance.”

At the time of his death the testator had eleven children living; his other children had died under age and unmarried. Two other of his children, Elizabeth and Louisa, died in 1881, leaving the testator’s eldest son Robert George their heir-at-law. Robert George died in 1884, having made a will by which he devised and bequeathed all his estate to his wife (now Mrs. James). The testator’s widow died on October 9, 1895.

NORTH J. One of the questions raised on this summons was, whether the effect of the maintenance clause was to vest the shares of beneficiaries immediately on the death of the testator.

1896

*In re*

WINTLE.

TUCKER

*v.*

WINTLE.

*Robertson-Macdonald*, for the plaintiffs, the trustees of the will.

*Brabant*, for children of the testator now living, and *Gatey* and *Romer*, for the children of deceased children of the testator. If there was a gift of the intermediate income to the children under twenty-one there would be sufficient to make the shares of the children otherwise contingent on their attaining twenty-one vest immediately; but, the direction here being to apply so much of their income as the trustees shall think fit, which is not necessarily exhaustive of the income, it is not tantamount to a gift of the whole intermediate income: therefore the shares of the two children who died under age did not vest, but accrued to the other beneficiaries: *Leake v. Robinson* (1); *In re Jobson*. (2)

*Butcher*, for Mrs. James. Where there is a trust for maintenance of the members of a class who are entitled to participate in a fund if they attain twenty-one out of their separate shares, the trust for maintenance is sufficient to make the interests of the members vest: *Fox v. Fox*. (3) Mrs. James therefore, as devisee of her husband, the heir of the children who died under twenty-one, is entitled to the shares of those children in the realty.

*Methold* and *Gilbart-Smith*, for other parties.

July 30. NORTH J. (after deciding that the word "previously" in the gift in remainder to the testator's children meant before the death of his wife, and observing that independently of the clause giving power to apply income for maintenance there was a gift to the testator's children contingent on their severally attaining twenty-one):—

The question is whether the effect of this clause is to make the shares vested which under the earlier part of the will

(1) 2 Mer. 363.

(2) 44 Ch. D. 154.

(3) L. R. 19 Eq. 286.

taken by itself would be contingent. In *Fox v. Fox* (1) the late Master of the Rolls did take the view that there was vesting. The terms of the will under consideration in *Fox v. Fox* (1) were very like those in the present case. There was, after the determination of a life interest, a trust to divide a fund amongst the children of T. equally as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees for the time being might think fit, for his or her maintenance and education until such share should become payable as aforesaid; and the Master of the Rolls decided on the construction of that clause that the interests were vested; it would not be fair to say that it was a mere obiter dictum. He dealt with the case on the footing that the clause effected a vesting, and so decided. He referred to a difficulty that arose in his mind on the earlier cases, *In re Ashmore's Trusts* (2) and *Pulsford v. Hunter* (3); and those cases were dissented from by him, as the head-note states. In fact, the Master of the Rolls says, after referring to the judgment of Lord Cottenham in *Watson v. Hayes* (4): "If that be the law, it is very difficult to support the decision in *In re Ashmore's Trusts*." (2) But the Master of the Rolls himself, in the later case of *In re Parker* (5), pointed out that the decision in *Fox v. Fox* (1) is not so large as the language of his judgment. In *Fox v. Fox* (1) he says (6): "I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose." Having regard to his decision in *In re Parker* (5) it is quite clear that the passage is wider than his view of the law.

Looking carefully at the cases of *In re Ashmore's Trusts* (2) and *Pulsford v. Hunter* (3), they may be perfectly right and yet

NORTH J.

1896

*In re*  
WINTLE.  
TUCKER  
*v.*  
WINTLE.

(1) L. R. 19 Eq. 286.

(2) L. R. 9 Eq. 99.

(3) 3 Bro. C. C. 416.

(4) 5 My. &amp; Cr. 125.

(5) 16 Ch. D. 44.

(6) L. R. 19 Eq. 290.

NORTH J. consistent with the decision in *Fox v. Fox*. (1) In that case the Master of the Rolls says: "There still remains the difficulty that the gift here is not a gift of the whole income absolutely for maintenance: there is a discretionary power to apply the whole income, or so much as the trustees may think proper, and the question is, whether that is a gift of the whole interest within the rule as laid down in *Watson v. Hayes* (2) and the other cases I have referred to. On that point *Harrison v. Grimwood* (3) is a distinct authority. There the legacy was given to a class, followed by a direction, during the minority of the members of the class, to apply the interest 'or a competent portion thereof' for maintenance; and the Court held the legacy was vested. Lord Langdale does not appear to have considered the indication of intention derived from the direction to pay the whole income as affected by the words enabling the trustees to apply a competent portion for maintenance; he treated it as a gift of the whole income followed by a discretion to apply less than the whole income; and that appears to me to be a rational view." Now, with great deference, that statement hardly does justice to *Harrison v. Grimwood*. (3) In *Harrison v. Grimwood* (3) there was not, as might be supposed from the observations in *Fox v. Fox* (1), a gift to a class who should attain twenty-one. The trust there was "upon trust to pay, apply, and divide one-third part of the said principal trust moneys unto and among all and every my children when and as they shall severally and respectively attain the age of twenty-six years, with benefit of survivorship if any shall die under twenty-six years of age without issue. And if at the time of my daughter's decease any of her children shall be under twenty-one years of age, upon trust to place and put out the principal share or shares of such child or children, so under age, upon government or real securities, and during the minority of such child or children, pay, apply, and dispose of the interest and proceeds, or a competent part

(1) L. R. 19 Eq. 286, 290.

(2) 5 My. & Cr. 125.

(3) 12 Beav. 192. [In the report the words of the will are recited in

the oblique form. Here the learned judge has restored them as they must have stood in the will itself.—F. P.]



thereof, in, for, and towards the maintenance and education of such child or children." Therefore, in point of fact, the trust was not to apply the income for the whole period till the child attained twenty-six, but only till the child attained twenty-one, the legacy being contingent on its attaining twenty-six years; so that there was not such a point as was put by the Master of the Rolls in *Fox v. Fox* (1); and though the decision that the shares were vested was arrived at, it was only on the construction of the whole will. If *Fox v. Fox* (1) were the only case on the subject I should follow it; but it has been the subject of comment in subsequent cases, and it seems to me has not been altogether accepted. In *In re Grimshaw's Trusts* (2) a similar point came before Hall V.-C. There the trust of a settlement was after the death of the survivor of husband and wife to apply the income of the settled fund or of so much thereof as they should think proper, in the maintenance, education, and bringing up of their child or children during their minorities, and upon their attainment to the age of twenty-one years to pay and divide the principal sum, with the accumulations thereof, unto and equally amongst such child or children. There it was held that the shares of the children did not vest till they attained twenty-one.

[His Lordship read the first part of the second paragraph of the judgment of Hall V.-C. (3), and from "It appears to me, having regard to the authorities" (4), to "That distinguishes that case" (*Fox v. Fox*) (1) "from the present," and continued:—]

There is a later case of *Dewar v. Brooke* (5), also before Hall V.-C., in which it seems to me he did dissent from *Fox v. Fox*. (1) In that case there was a trust of a fund for children of a testator, who should being sons attain twenty-five, or being daughters attain twenty-one or marry, to be divided on the youngest attaining twenty-one. The testator empowered his trustees to apply "the whole or such part as they should think fit of the annual income to which any child should be

NORTH J.

1896

*In re*

WINTLE.

TUCKER

v.

WINTLE.

(1) L. R. 19 Eq. 286.

(3) 11 Ch. D. 409.

(2) 11 Ch. D. 406.

(4) *Ibid.* 410.

(5) 14 Ch. D. 529.

NORTH J. entitled in expectancy towards the maintenance or education of such child." There were two children, the elder a son under twenty-five, the younger a daughter who had attained twenty-one. It was held that the interest of the son was contingent on his attaining twenty-five. I said that *Fox v. Fox* (1) was very similar to the present case. I think also that *Dewar v. Brooke* (2) is very similar; both agree in this, that the direction is not to apply a part of the income of the whole fund to the maintenance of the children, but to apply a sufficient part of the income of the presumptive share of each child.

1896  
 In re  
 WINTLE.  
 TUCKER  
 v.  
 WINTLE.

In *Dewar v. Brooke* (2) the Vice-Chancellor points out that the language of the trust in that case is rather different from the language of the trust in *Fox v. Fox*. (1) [His Lordship read the first part of the judgment in *Dewar v. Brooke* (2), and continued :—]

No doubt there is a slight difference in the language of the two trusts; but the learned judge does not point out what the difference in substance is. [His Lordship read the rest of the judgment in *Dewar v. Brooke* (2), concluding with the passage "as to *Fox v. Fox* (1), it may in some other case have to be determined whether it is in conflict with the decision of James L.J. in the case of *In re Ashmore's Trusts* (3), and if so, which decision is to be followed."]

Then in *In re Parker* (4), a later case before the Master of the Rolls, a testatrix gave her residuary estate in trust to pay the income, "or such part thereof as her trustees" should "from time to time deem expedient, in or toward the maintenance and education of her children till they attained twenty-one, and on their attaining their respective ages of twenty-one on trust as to capital for her children in equal shares, and to settle each daughter's share (whether original or accruing)" with power of advancing half the presumptive share of each child.

The Master of the Rolls said (5): "It appears to me that this case is different from that of *Fox v. Fox*. (1) In my opinion, when a legacy is payable at a certain age, but is, in terms, con-

(1) L. R. 19 Eq. 286.

(3) L. R. 9 Eq. 99.

(2) 14 Ch. D. 529.

(4) 16 Ch. D. 44.

(5) 16 Ch. D. 45.

tingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given ; and not the less so when there is superadded a direction that the trustees ‘ shall pay the whole or such part of the interest as they shall think fit.’ But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age.” That is an explanation and amplification of what is said in *Fox v. Fox* (1), and he pointed out that there was nothing in the case before him to accelerate vesting.

There is another case I wish to refer to very shortly, namely, the case of *In re Sanderson’s Trust* (2), where there was a direction by a testator to trustees of property demised and bequeathed to them during the life of J. S. to pay and apply “the whole or any part of the rents, issues, and profits for and towards his maintenance, attendance, and comfort” ; and it is with reference to those words that I wish to refer to Lord Hatherley’s decision. He says (3) : “ In the present case the trust is plainly very different. It is a trust to apply ‘the whole or any part’ for the purpose specified, namely, for the maintenance, attendance, and comfort of the testator’s brother. And with regard to the absence of any words indicating that this application is to be at the discretion of the trustees, I apprehend, that, in one sense, there is no discretion in the trustees. The trustees have not the discretion of saying ‘we will withhold any part of this income merely upon our representation of what we think discreet.’ ”

A little further on he says (4) : “ I do not think, therefore, that the present case is within the class of cases where an entire fund is given and a purpose is assigned as the motive of the gift ; neither do I think that *Cope v. Wilmot* (5) is to be considered as a case which ought to govern this, so as to lead

NORTH J.

1896

*In re*

WINTLE.

TUCKER

v.

WINTLE.

(1) L. R. 19 Eq. 286.

(3) 3 K. &amp; J. 507.

(2) 3 K. &amp; J. 497.

(4) Ibid. 508.

(5) 1 Coll. 396 (n).

NORTH J. me to hold, that the whole income of the property is given out  
 1896 and out for the benefit of the testator's brother, or any more  
 { of that income than is necessary for the particular purposes  
*In re* specified in the gift." That is a very clear statement by a very  
 WINTLE. great lawyer of the effect of a discretion to pay the whole or a  
 TUCKER competent part.  
 v.  
 WINTLE.

Before dealing with the will under consideration there is only one other case I will refer to—the case of *Watson v. Hayes* (1), mentioned in several of the cases I have cited—a decision of Lord Cottenham. There was a direction to executors to apply 25*l.* per annum for the maintenance of testator's natural daughter till twenty-one or marriage, which should first happen; when his executors were thereby required to pay to her 500*l.* She died under twenty-one, unmarried; the legacy failed. As the judge pointed out, the 25*l.* a year was what the interest on 500*l.* would have amounted to at 5 per cent.; but it was not a gift of the interest on the principal sum of 500*l.* Lord Cottenham said (2): "It is well known, that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which effects the vesting of the legacy. Such was the opinion of Sir W. Grant in *Hanson v. Graham* (3) and *Leake v. Robinson* (4), and recognised by Sir J. Leach in *Vawdry v. Geddes*. (5) It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy."

Applying the principles to be derived from those authorities, the question is, Is there a gift of the whole income or not during the suspension of payment? I take it from the authorities that

(1) 5 My. & Cr. 125.

(3) 6 Ves. 239.

(2) *Ibid.* 133.

(4) 2 Mer. 363.

(5) 1 Russ. & My. 203.



if all the income is given it will make that vest immediately which but for the direction as to income would not have vested till a later date, and a direction that the income shall be applied for maintenance would not make any difference, nor would a direction that part of the income shall be applied for maintenance make any difference, if that is part of income the whole of which is given. On the other hand, supposing legacies are given payable at a future date, and something is given out of income for maintenance, not necessarily exhausting the income, it seems to me that, in accordance with *Watson v. Hayes* (1), the gift of maintenance out of income is not sufficient to make the legacies vest. Then we have to deal with the question whether there is a gift here of the whole or part of the income. There are two decisions that seem to me inconsistent, namely, *Fox v. Fox* (2) and *Dewar v. Brooke* (3), to say nothing of others. I must come to the best conclusion I can. What is the meaning of the phrase "the whole or such part as they or he shall think fit"? I do not think the testator intended by that to give the whole of the income in any event. Supposing the trustees thought one-half was sufficient for maintenance, where is the rest of the income to go? I do not see any dedication of it to the legatees. I think that such a phrase as "the whole or a part" is to be applied in maintenance would mean that so much as is necessary only is to be so applied. It is possible that the whole income would be wanted: if so the whole would go; but that the whole would go in every event is not what the testator had in his mind. In my opinion, therefore, the two children who did not attain twenty-one did not take a vested interest, and nothing passed to their heir.

Solicitors: *Robbins, Billing & Co., for Abbot, Pope & Co., Bristol; G. A. Collyer, for F. A. S. Locke, Bristol.*

(1) 5 My. & Cr. 125.

(2) L. R. 19 Eq. 286.

(3) 14 Ch. D. 529.

NORTH J.

1896

In re

WINTLE.

TUCKER

v.

WINTLE.

KEKEWICH  
J.

*In re* DYSON AND FOWKE.

[1896 D. 740.]

1896

June 26.

*Will—Real Estate—Gift among Persons sui juris—Charge of Debts and Legacies—Trustees—Power of Sale—Vendor and Purchaser—Title.*

A testator, after directing payment of his debts, funeral and testamentary expenses, and bequeathing several legacies, gave his residuary real and personal estate to trustees, as to certain parts of his real estate, upon trusts by way of settlement; and as to the residue of his real and personal estate, he gave the same to four persons, all *sui juris*, absolutely. And he declared that his trustees should have power to sell his real estate at such times as they should deem expedient, and should hold the proceeds upon the trusts of his will.

The trustees, purporting to exercise their power of sale, sold part of the real estate comprised in the latter residuary gift:—

*Held*, as between the vendors and the purchaser, that the power of sale was valid, not on the ground that the testator shewed any intention that it should be exercised for the purpose of division among the beneficiaries, but on the ground that the debts and legacies were charged on the real estate under the doctrine in *Greville v. Browne* (7 H. L. C. 689), and that the power of sale was intended to be exercised for the purpose of raising money to pay the same if required.

*In re Lord Sudeley and Baines & Co.* ([1894] 1 Ch. 334), and cases there cited, discussed.

JOHN BURNS DYSON, by his will dated October 13, 1892, after directing payment of his debts, funeral and testamentary expenses, and making certain specific and pecuniary bequests, devised a certain freehold house to his son Cornelius Dyson absolutely, and bequeathed certain leasehold premises in Birmingham to his granddaughters therein named; and as to all the rest of his real and personal estate, he devised and bequeathed the same to his son Cornelius Dyson and Jacob Rowlands, upon trust, as to certain freehold lands and messuages, to permit his wife Mary Dyson to receive the rents and profits thereof during her life, and after her death to sell the same and divide the proceeds between the children of his son John Dyson, and as to certain freehold ground-rents to pay the same to the testator's daughter Isabella Phillips during her life, and after her death to sell the same and divide the proceeds between the

children of the testator's son Cornelius Dyson : and the testator KEKEWICH then proceeded as follows :—

“ As to all the rest and residue of my real and personal estate, I give devise and bequeath the same unto the two children of my late son Edwin Dyson, and all the children of my son Cornelius Dyson equally, share and share alike. I declare that the trustees or trustee for the time being of this my will shall have power to sell the whole or any part of my real estate at such time or times and in such manner as they shall deem expedient, and shall hold the proceeds upon the trusts of this my will.”

And the testator appointed the said Cornelius Dyson and Jacob Rowlands to be the executors and trustees of his will.

By a codicil dated December 27, 1892, the testator revoked the gift of the residue of his estate to the children of his late son Edwin Dyson and the children of his son Cornelius Dyson, and in lieu thereof, the testator made the following gift :—

“ I devise and bequeath all the rest and residue of my real and personal estate unto my wife Mary Dyson, and my two sons Cornelius Dyson and John Dyson, and my daughter Isabella Phillips, share and share alike, and in all other respects I confirm my said will.”

The testator made three other codicils to his will, and thereby (inter alia) revoked the bequest of leasehold premises to his granddaughters, and directed that the same should fall into his residuary estate ; and the testator directed that the freehold premises in which he had by his will given his wife a life interest as herein mentioned should belong to his wife absolutely ; and he also revoked the devise of ground-rents in which he had given his daughter Isabella Phillips a life interest, and he took certain of his freehold properties out of the ultimate residuary devise, some of which he directed his trustees to hold in trust for his wife for life, and after her death to sell and divide the proceeds among the persons therein named, and others of which he directed his trustees to hold in trust for his daughter for life, and after her death to sell and divide the proceeds in the manner therein mentioned.

J.

1896

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In re  
DYSON  
AND  
FOWKE.  
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KEKEWICH J. The testator died on November 16, 1895, leaving his wife and his sons Cornelius Dyson and John Dyson and his daughter Isabella Phillips (all of whom had attained the age of twenty-one years) him surviving.

1896  
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In re
 DYSON
 AND
 FOWKE.
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The testator's general personal estate was insufficient to pay his debts and legacies, but he left a considerable amount of house property in Birmingham and its neighbourhood. On February 27, 1896, the executors and trustees (Cornelius Dyson and Jacob Rowlands) put up for sale all the freehold and leasehold estates included in the ultimate residuary devise contained in the will and first codicil, and which had not been taken out of the same and specifically dealt with by any of the later codicils.

Ernest Cope Fowke became the purchaser of two of the freehold lots for a total sum of. 695*l.*, on which he paid his deposit. Upon investigating the title, the purchaser took the objection that the vendors had no power to sell the land in question, even under the will ; or that, at all events, the power, if any, had been revoked by the first codicil : and he insisted that the four persons beneficially entitled to the testator's residuary estate should all be parties to the conveyance. The vendors, on the other hand, contended that they had the legal estate, and that they could, as trustees, sell the property and make a valid conveyance. As the purchaser insisted upon his objection, the vendors took out a vendor and purchaser summons, asking a declaration that under the will and codicils they had the power to sell and make a valid assurance of the property to the purchaser without the concurrence of any other person.

On the hearing of the summons in chambers, his Lordship held that the vendors could not make a good title without the concurrence of the beneficiaries, and dismissed the summons with costs. The vendors now moved to discharge the order made in chambers, and for a declaration in the terms of the summons.

E. P. Hewitt, for the vendors. In the first place, the vendors have the legal estate. The whole of the testator's

residuary real and personal estate is given to the trustees on trust, and there is nothing in the will or codicils to divest the trustees of the legal estate. In any case, the trustees can sell and make a valid conveyance under the power contained in the will. The power is not affected by the first codicil, which merely substitutes different beneficiaries from those named in the will. The power is expressed in the widest possible terms, and *prima facie* applies to all the testator's real estate, and the burden of proof lies on the purchaser to shew that it does not apply to the land in question. The terms of the will amount to a charge of the testator's debts and legacies on his real estate: *Greville v. Browne* (1); and power was needed to raise the money to discharge the same. The fact that the beneficial interest in the real estate is vested in persons absolutely entitled is immaterial. The power of sale may also have been intended to be exercised for the purpose of division: *Peters v. Lewes and East Grinstead Ry. Co.* (2)

[KEKEWICH J. In that case, the testator expressly stated that the power to sell was for "the purpose of division."]

The intention may be inferred, as was done in *In re Cotton's Trustees and the School Board for London* (3) and in *In re Lord Sudeley and Baines & Co.* (4); *In re Henzell.* (5)

Morton Brown, for the purchaser. In *Peters v. Lewes and East Grinstead Ry. Co.* (2), the will expressly stated that the power of sale was for the purpose of division. Moreover, in that and the other cases cited on behalf of the vendors, there was originally a previous life interest, although such life estate had determined at the time when the power of sale was exercised. Here there is an immediate absolute gift to the persons named in the first codicil, all of whom are *sui juris*, and I submit that the power of sale cannot be exercised in regard to the land in question.

In any case, there is no reason why the beneficiaries should not concur in order to make our title secure. [He referred to *In re Davies to Jones and Evans.* (6)]

(1) 7 H. L. C. 689.

(2) 18 Ch. D. 429.

(3) 19 Ch. D. 624.

(4) [1894] 1 Ch. 334.

(5) W. N. (1887) 240.

(6) 24 Ch. D. 190, 194.

KEKEWICH
J.

1896

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In re
DYSON
AND
FOWKE.
—

KEKEWICH J. KEKEWICH J. Having had the advantage of a much fuller argument than it is possible to have upon a question of this kind in chambers, I have come to the conclusion that the order must be discharged, and that the vendors' title must be upheld.

1896

In re
DYSON
AND
FOWKE.

The question is whether the trustees can make a title under the power of sale which is undoubtedly contained in this will. It is a power expressed in the widest terms as regards time and otherwise. [His Lordship read the power, and continued:—] Mr. Hewitt has convinced me that the power is applicable to the particular gift of residue now in question. By the will that residue is given in the simplest possible manner—"unto the two children of my late son Edwin Dyson, and all the children of my son Cornelius Dyson equally, share and share alike." The beneficiaries are altered by the codicil, but the mode of gift is not altered. There is nothing whatever in the way of a settlement, or of a life estate, or of restriction of enjoyment in the case of any of these beneficiaries: it is simply a gift in fee. Is the power I have read a good power as regards the real estate given in the way in which it has been given? About that I apprehend there can be no doubt, so long as there is some purpose for which the power can be exercised. Chitty J. discussed that in *In re Lord Sudeley and Baines & Co.* (1), where he says: "These unlimited powers can be exercised only while the purposes of the settlement remain unexhausted"; and then, in a passage which I will not pause to read, he explains that, and I adopt his language as my own. That exactly coincides with the language of Lord St. Leonards in his work on Powers, 8th ed. p. 859, which is cited by Fry J. in *In re Cotton's Trustees and the School Board for London* (2): "Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to be exercised after the determination of the limitations which they were intended to overreach." The question, therefore, I have to consider is, Were there any trusts of the will existing at the date of the testator's death, or within a reasonable time afterwards, which

(1) [1894] 1 Ch. 334, 339.

(2) 19 Ch. D. 624, 627.

had determined so as to prevent the exercise of this power? KEKEWICH J.
 Now, the testator has himself taken care to limit the time for
 the exercise of the power, because he says that the trustees
 "shall hold the proceeds upon the trusts of this my will."

Mr. Hewitt has argued that I ought to infer that the testator intended the power of sale to be for the purposes of division; and that if so I may uphold the power on that ground, and he cited *Peters v. Lewes and East Grinstead Ry. Co.* (1), where the power was given expressly "for the purpose of division," and also the case before Fry J. of *In re Cotton's Trustees and the School Board for London* (2), and the case before Chitty J. of *In re Lord Sudeley and Baines & Co.* (3), where it is pointed out that the will contained provisions from which it might be inferred the testator intended that the power of sale should subsist for the purpose of making the more convenient distribution among the objects of his bounty. But in those cases there were a large number of legatees, there were properties of a peculiar character, and so forth; but I do not find any such circumstances here. I regard the argument as unsound, because, in order to infer the existence of the power, I must find that there is such a purpose. Here I find nothing but a gift to a small number of persons, and that a direct gift and not by way of division. The legal estate is in the trustees: the equitable fee is given to the beneficiaries, and there is no reason why they should not at once call upon the trustees to clothe them with the legal title; and if the trustees' title stood on that alone, I should decide against them; but it does not stand alone, and that is why I am now differing from my own conclusion in chambers. I have had my attention more directly called to other grounds. The testator not only directs his debts and funeral and testamentary expenses to be paid, but he has also given a large number of legacies, and he has charged these legacies on his residuary real and personal estate by the operation of the doctrine of *Greville v. Browne* (4), that where a man gives legacies and then the residue of his real and personal estate, that residue is charged with the

1896
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*In re*  
 DYSON  
 AND  
 FLOWKE.

(1) 18 Ch. D. 429.

(3) [1894] 1 Ch. 334.

(2) 19 Ch. D. 624.

(4) 7 H. L. C. 689.

**KEKEWICH** legacies. The payment of these legacies was distinctly part of the trusts of this will ; and it seems to me, apart from anything else, that this trust had to be performed, and the trustees had a duty to perform, and it rests with them to decide whether they shall sell the real estate for that purpose. I am only considering the question as between vendor and purchaser. The purchaser is not bound to inquire, and if he did, would probably not be told, why they are selling the estate. It is sufficient for him to know that the trustees have a power of sale for the purposes of the will. If a beneficiary were here suing the trustees and insisting that they could not sell, then it would be for the trustees to say why they wanted to exercise the power of sale. But that is not the question which I have to try here, which is simply one between vendor and purchaser. As between vendor and purchaser the question is whether, assuming the trustees are acting honestly (and upon that I have no reason to doubt), they have a power which they can exercise. In my opinion they have ; and, therefore, I must discharge the order in chambers, and hold that the vendors have a good title ; and for the benefit of the purchaser, and that he may have no difficulty hereafter, and for his satisfaction in order that he may have a good title, I order him to pay the costs both here and in chambers.

J.

1896

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In re
DYSON
AND
FOWKE.

Solicitors : *Preston, Stow & Preston, for F. Rowlands, Birmingham ; Emmet & Co., for J. C. Fowke & Son, Birmingham.*

G. I. F. C.

Considered. GIBSON v.
SOUTH AMERICAN
STORES
[1950] 1 Ch. 177

In re BUCK.
BRUTY v. MACKEY.

[1896 B. 2102.]

KEKEWICH
J.
1896
Aug. 4, 5.

*Friendly Society—Poverty—Charity—Failure of Objects—Charitable Legacy—
Lapse—Cy-près.*

In 1800 a friendly society was established to provide, by subscriptions, contributions, and fines, an “invested fund” for the relief, by means of annuities, of members, their widows and children, if in distressed circumstances.

By the will of a testator who died in 1893 a legacy of 500*l.* was bequeathed to the society for the purposes thereof. At that time there were only three annuitants living, being widows of deceased members, and there was only one member remaining, who was also sole surviving trustee of the “invested fund,” which was amply sufficient to provide for the three annuities. Subsequently two of the three annuitants died.

On an originating summons by the executors of the will against the sole surviving member, the sole surviving annuitant, and the residuary legatees, to ascertain whether the society was entitled to the legacy :—

Held, (1.) that the society was a “charity” within *Commissioners for Special Purposes of the Income Tax v. Pemsel* ([1891] A. C. 531); (2.) that it was a charity existing at the testator’s death and therefore the legacy had not lapsed; and (3.) that the legacy, not [being required for the remaining annuity, was applicable *cy-près*.

Cunnack v. Edwards (ante, p. 679) distinguished.

THOMAS BUCK, by his will dated June 28, 1884, bequeathed, among charitable legacies to various institutions, “To the Commercial Travellers’ Society, whose office is at 17, Philpot Lane, City, the sum of 500*l.* . . . for the purposes of such institutions respectively :” and he directed that the said charitable legacies should be paid free of legacy duty, and that they and the duty thereon should be paid out of his pure personal estate; and he declared that the receipt of the treasurer for the time being of the said institutions respectively should be an effectual discharge for the said charitable legacies respectively. And his residuary estate he gave to trustees upon trust for sale and to hold the net proceeds thereof in trust for all such of his children as should be living at his death, in equal shares, the share of each child being settled in manner therein mentioned.

KEKEWICH
J.

1896

In re
BUCK.

BRUTY
v.
MACKEY.
—

The testator died on January 8, 1893. His executors paid all his debts and legacies except the above-mentioned legacy of 500*l.*, which they retained under the following circumstances:—

In January, 1800, “The Commercial Travellers’ Society” was established as a friendly society in the City of London. The rules of the society, as afterwards, in 1832, certified by the Registrar of Friendly Societies, stated (rule 1) that the object of the society was “to provide a fund for the relief of sick and distressed members, their widows and children, in the manner hereinafter mentioned.”

Rule 2 provided that the affairs of the society should be managed by a committee who (rule 3) should choose a president, vice-presidents, and a secretary annually at a general meeting, the president and vice-presidents to be chosen out of the general body of the society. Rule 6 provided a scale of annual or life subscriptions of members, varying according to age. Rule 13 provided that the sum of 20,000*l.*, which should become and remain the permanent fund of the society, should be invested by the treasurer under the direction of the committee in the purchase of Government funds or stock, or otherwise, pursuant to 10 Geo. 4, c. 56 (the Friendly Societies Act, 1829), ss. 13 and 31, in the names of trustees.

Rule 14 was as follows: “In case a member shall be afflicted with sickness, so as to render him incapable of employment, and in distressed circumstances, or shall become infirm, or meet with any other infirmity which may, in the opinion of the committee, render him an object deserving the assistance of the society, he shall be entitled, at the discretion of the committee, to a sum not exceeding one guinea per week during the time he shall so remain sick and distressed. . . .”

Rule 15 was as follows: “In case a member shall die and shall leave a widow, to whom he shall have been married for the space of three years previous to his decease, or a widow to whom he shall have been married as aforesaid, and one or more children, in distressed circumstances, the said widow, upon her claim being recommended to the satisfaction of the committee by three members of the society whose subscriptions shall be fully paid up at the time of signing such recommenda-

tion, shall receive a sum not exceeding 20*l.* per annum for herself, at the discretion of the committee, and in like manner a further sum, not exceeding 5*l.* per annum for each child, till such child or children respectively shall attain the age of fourteen years." Then the rule went on to provide for payment of an annuity to any child in distressed circumstances of a member dying without leaving a widow, such annuity not to exceed 10*l.*, and to be payable till the age of fourteen.

Rule 17 provided that "all money arising from contributions and fines, &c.," should be applied to the purposes in the rules mentioned, and in defraying the necessary expenses of management.

An "invested fund" was duly provided and the income thereof was from time to time applied in payment of annuities granted in accordance with the rules to persons entitled to relief; but eventually, in consequence of the falling off in donations and subscriptions, the income of the fund ceased to be sufficient, and the deficiency was made up from time to time out of the capital.

In July, 1888, the then three trustees of the society paid into Court, under the Trustee Relief Act, to the credit of the society, a sum of about 5000*l.*, being the amount of the then "invested fund" of the society. The grounds for payment-in were that, in consequence of the advanced age of the then remaining annuitants, six in number, the fund would probably soon be more than sufficient to pay the annuities out of the income, and that the same and the surplus income could only be dealt with under the direction of the Court; that since January, 1871, no general meeting of the members of the society had been held; that previously to that date meetings had been summoned by advertisement, but no one had attended except the committee; that the members of the committee had gradually become reduced to two, who were both men of advanced age; and that, as it had become practically impossible to hold meetings of the members, the society could not be dissolved under the Friendly Societies Act, 1875, and even if it could be dissolved, the persons entitled to the trust fund could not be ascertained.

On February 19, 1889, an order was made, on petition, for

KEKEWICH
J.

1896

In re
BUCK.

BRUTY
v.
MACKAY.
—

KEKEWICH payment to the six remaining annuitants of their several annuities out of the income of the fund in court, and also out of the capital in case the income should prove insufficient.

J.
1896
In re
BUCK.
BRUTY
v.
MACKEY.
—

At the death of the testator, Thomas Buck, in 1893, three of these annuitants were still living, and of the three trustees who were living in 1888 and who were at that time believed to be the sole surviving members of the society, one only was living at the testator's death, namely, John Brunt Mackey. Of the other two trustees, one had died in 1891, and the other, George Chater, had died on October 30, 1892.

In May, 1896, only one of the six annuitants remained, Harriet Lucy Cage, who was in receipt of an annuity of 32*l.* as the widow of a former member of the society; and, as far as was then known, the only remaining member of the society was the said John Brunt Mackey, who was also the sole surviving trustee and member of the committee. The "invested fund" now standing in court to the credit of the society was represented by a sum of 4836*l.* 9*s.* 8*d.* India 3 per cent. Stock, and a sum of 320*l.* 13*s.* 11*d.* cash.

On May 18, 1896, an originating summons was taken out by the trustees and executors of the will of Thomas Buck against J. B. Mackey, the sole surviving trustee and supposed sole surviving member of the society, Mrs. Cage, the sole surviving annuitant, Thomas William Buck, a son of the testator and one of his residuary legatees, and the Attorney-General, for the determination of the following questions: (1) Whether the institution called "The Commercial Travellers' Society" was so existing at the date of the testator's death as to have become entitled to the legacy of 500*l.*, or was not so existing; (2) whether, if the institution was so existing, the legacy ought to be paid into court, or how otherwise it ought to be dealt with; and (3) whether, if the institution was not so existing, the legacy ought to be treated as lapsed and fallen into the testator's residuary estate, or to be applied *cy-près* for charitable purposes.

The summons now came on for hearing.

D. G. Begg, for the plaintiffs.

Sheldon, for the defendants, J. B. Mackey and H. L. Cage. **KEKEWICH**
 This society was existing at the testator's death. It is not at
 present known for certainty whether there may not be still
 living other members or widows or children of deceased mem-
 bers; but the defendant Mackey is an admitted member, and
 the defendant, Mrs. Cage, is an admitted annuitant. This
 society, being a friendly society, is not a charitable institution,
 and therefore its funds cannot be applied cy-près: *In re Clark's*
Trust. (1) Being subject to the Friendly Societies Act, 1875,
 the society can only be dissolved under the provisions of that
 Act; and until it is dissolved according to the statutory method
 it must be taken to be an existing institution even though there
 may be only one member left. The legacy should be paid to
 the defendant Mackey as sole surviving trustee of the society,
 or should be paid into Court so as to be properly secured for
 Mrs. Cage's annuity.

J.
 1896
 In re
 BUCK.
 BRUTY
 v.
 MACKEY.
 —

Renshaw, Q.C., and *A. M. Begg*, for the defendant T. W.
 Buck, as representing the residuary legatees. This society
 had ceased to exist for all practical purposes at the death
 of the testator. There was then only one member left,
 and a "society" cannot consist of one member only. One
 member of a society cannot hold a meeting any more than one
 member of a company. The society was moribund years before
 the testator's death, and practically died on October 30, 1892,
 when G. Chater, the last member but one, died. The legacy,
 therefore, lapsed and fell into the residue, and is not applicable
 cy-près: *In re Rymer*. (2) This society was in fact a private
 mutual insurance society. The rules do not shew that it was
 a charity, and certainly there was no general charitable inten-
 tion shewn by this testator in giving this legacy. That being
 so, the gift cannot be applied cy-près. Directly the annuitant
 dies there will be a resulting trust for the benefit of this
 testator's estate, and it is therefore idle to go through the form
 of paying the legacy into court. A society registered under the
 Friendly Societies Act is not a charity: *In re Clark's Trust* (1);
Cunnack v. Edwards (3), in which latter case it was held, on

(1) 1 Ch. D. 497.

(2) [1895] 1 Ch. 19.

(3) Ante, p. 679.

KEKEWICH J. appeal, that where the objects of an existing friendly society had failed the Crown was entitled to the property as bona vacantia; but here, as the society is non-existent, the legacy passes to the residuary legatees.

1896

In re
BUCK.

BRUTY

v.
MACKEY.

Ingle Joyce, for the Attorney-General. The Crown does not claim this money as bona vacantia; but this society is, under its rules, beyond question a charitable institution, and this legacy is a charitable legacy; in fact it is called a charitable legacy by the testator himself, and it is given out of pure personality. A friendly society may be a charity. No doubt, the authorities say that some friendly societies are not charitable institutions in the legal sense; but to see whether such a society is a charity or not you must look at its objects. In the present case the rules expressly state that "distressed circumstances" are a condition necessary to entitle a member, his widow or children to relief. The object, therefore, of the society is clearly charity. Donations also for that object were contemplated by the rules and were received by the society. In the society in *In re Clark's Trust* (1) poverty was not a necessary ingredient, and that distinguishes it from the present case. So, with regard to the society in *Cunnack v. Edwards* (2), poverty was not a necessary ingredient at all, for under the rules a rich widow might be as much entitled to the benefits of the society as a poor one. Notwithstanding that the objects for which this society was founded have practically failed, the legacy is applicable cy-près: *In re Slevin* (3), *Spiller v. Maude* (4); for the money is not required to be applied for the one annuity remaining, which is already secured by the "invested fund" in Court.

Renshaw, Q.C., in reply.

KEKEWICH J. There are two questions falling for decision wholly independent of each other. The first is whether "The Commercial Travellers' Society, whose office is at 17, Philpot Lane, City," to which society, through the treasurer for the purposes of the society, the testator gives 500*l.*, is a "charity"

(1) 1 Ch. D. 497.

(3) [1891] 2 Ch. 236.

(2) Ante, p. 679.

(4) 32 Ch. D. 158, n.

within the ordinary doctrine of the Court as expounded by the House of Lords in the *Commissioners for Special Purposes of the Income Tax v. Pemsel*. (1) Until we have decided that question we cannot make any progress with the other. If I were uncontrolled by decision my opinion would be in favour of this being a charity. Now, am I controlled by decision? It seems to me not. *Cunnack v. Edwards* (2) and the other cases which have been cited all dwell on the absence of the ingredient of poverty in persons who are entitled to the benefit of the particular institution. Lord Halsbury, in giving judgment in *Cunnack v. Edwards* (2), speaks of the society he then had to consider as a "perfectly business-like arrangement," and the society in the present case has been described argumentatively as "a mutual insurance society." If this is a case of a "perfectly business-like arrangement," if it is "a mutual insurance society," then it seems to me that, not only am I bound by authority, but it is a case that would clearly, reasonably and fairly fall outside the definition of "charity." It has been pointed out that this society has been maintained and has reached its present position, which is one at least of perfect solvency, not merely by the subscriptions of members (whether life members or annual members) whose subscriptions would be a certain fixed sum, but by voluntary subscriptions or donations—donations either by living persons or by will. That is a matter not to be forgotten, but it is by no means to my mind conclusive upon the question whether it is a charity. It is obvious, I think, on the face of these rules that this is not a society formed and maintained on actuarial principles. That is true of a very large number of societies either charitable or in the nature of mutual insurance societies. We are all acquainted with some most excellent institutions of that character which could not have been maintained and kept solvent but for large donations. It is those donations which enable such societies to start and be maintained. Certainly this society was not founded on actuarial principles. It depended upon adventitious aid, such as donations by those who did not themselves desire to have any benefit from the

KEKEWICH
J.
1896
In re
BUCK.
BRUTY
v.
MACKEY.
—

(1) [1891] A. C. 531.

(2) Ante, p. 679.

KEKEWICH society. That is why it really is not of so much importance that there were donations at all. Donations are for a different purpose. They are to raise the level of the benefits which ought in "a perfectly business-like arrangement," to borrow the words of Lord Halsbury, to be arrived at by actuarial calculations. Then, this fund having been obtained, it is to be applied in payment of certain annuities, annuities of 20*l.* to widows and 5*l.* to children. The children are to have an annuity of 10*l.* each when they are motherless as well as fatherless. I do not see any provision that the annuity in either case is to vary with the funds of the society. There is no calculation, as far as I can see, that the funds would provide the several annuities from time to time. For that, no doubt, the society depended very much on their outside subscriptions. So that it is not a mutual insurance society. It is not, as it seems to me, "a perfectly business-like arrangement," although it may be partly business and partly charitable; but what I find is this, that as regards both widows and children, the intended provision is strictly for those who are in what is called "distressed circumstances." That is clear from the language of rule 14. The words "distressed circumstances," although capable of many interpretations, grammatically, no doubt, mean, not only that a member is so sick that he cannot follow his ordinary employment, but that his position in life is such that he cannot live independently of that employment—that he is distressed in that sense. I do not think there can be any doubt that that is the meaning of the words.

Then, as regards "infirmity," that means some permanent disease, accident, or anything of that kind, rendering the member an object deserving of the assistance of the society. It is only reasonable to conclude that the committee would not be doing their duty in considering a man an object deserving the assistance of the society if, however painful his physical state might be, he had ample means. I understand then that the rule points distinctly to poverty. The same is true as regards rule 15, under which the widow of a member is, as a condition of relief, to be in distressed circumstances, and so with regard to the children, who are also to be left in "distressed circumstances."

J.
1896
In re
BUCK.
BRUTY
v.
MACKEY.
—

Here, therefore, I have that very element of poverty which KEKEWICH J. Hall V.-C. thought was absent in the case before him of *In re Clark's Trust* (1); and it was pointed out in *Commissioners for Special Purposes of the Income Tax v. Pemsel* (2), that although the decisions have gone far away from poverty as being the strict limit of charity, at the same time poverty is in itself an object of charity; and when you find poverty referred to in the provisions of such a society as this, it is impossible to say that this society is merely "a business-like arrangement" or "a mutual insurance society." Therefore I am not precluded by the authorities from saying that this society is a charity, which I hold it to be.

Then, if this is a charity, there comes the question, Is there a lapse of the legacy of 500*l.*? Assuming that the money is given to a charity that has ceased to exist at the date of the death—which seems to be the critical point—then, if the legacy has lapsed, the law of lapse applies at any rate to this extent, that the testator fails to specify the legatee; and, therefore, because there is no legatee which can be specified—because there is a non-existent body, just as there might be a non-existent person—the money must fall into residue. But it is agreed on all hands, not only that at the death of the testator, but that up to the present time, there was and is at least one annuitant claiming against the fund. So that the charity is alive to that extent, and must remain alive as long at least as that annuitant survives. I cannot, therefore, see how it can possibly be said that this society is dead, though it may still be, what Mr. Renshaw said it was, "moribund." The difference between "moribund" and "dead" is considerable. Test the case in this way. Supposing that this annuitant were not paid, she being entitled according to the rules of the society to be paid, could she not assert her rights? If she could assert her rights, she could assert them against the fund and against the administrators of the fund which is in court. It seems to me there is a duty to provide for her annuity which is still existing, and consequently the charitable institution is still existing. It does not follow, however, that because it is still existing it has not failed practically. It seems to me that the institution has

(1) 1 Ch. D. 497.

(2) [1891] A. C. 531.

J.
1896
In re
BUCK.
BRUTY
v.
MACKEY.
—

KEKEWICH failed, except so far as it is necessary to provide for this particular annuitant. That is a matter of consideration as regards the fund in court, with which I am not now dealing. But as regards this legacy of 500*l.*, it is clearly not wanted for the particular annuity, and it must be applied, that is to say, put in process of application, to objects akin to those to which the testator devoted his legacy, but to which it cannot be strictly applied because there are no means of so applying it.

There must be a declaration that the society is a charitable institution, and was existing at the testator's death, and that there was no lapse of the legacy of 500*l.* ; and there must be an order for payment of the money into court to the same credit as the other funds of the society, but to a separate account. The costs of all parties, as between solicitor and client, will come out of the legacy ; and there will be liberty to the Attorney-General to apply for a scheme.

Solicitors : *Duffield & Bruty ; Hare & Co.*

G. I. F. C.

FILBY v. HOUNSELL.

ROMER J.

[1895 F. 1615.]

Approved. BASMA v.
WEEKES
[1950] A. C. 441

1896

July 13, 14, 31.

*Vendor and Purchaser—Contract—Vendor's Name—Agent for Vendor—
Reference to Formal Contract—Statute of Frauds (29 Car. 2, c. 3), s. 4.*

The vendor's name was omitted from the conditions of sale by auction of a house and from the indorsed form of contract to be signed by a purchaser. The house was not sold at the auction; but subsequently the defendant sent a letter addressed on the face of it to J. & Co., who were the auctioneers, offering to purchase the house for 350%, and stating that if his offer was accepted he would "sign contract on auction particulars." J. & Co. replied by letter stating that on behalf of their client (who was the vendor), naming her, they accepted the offer "subject to contract as agreed. We enclose draft contract." The draft was identical with the contract embodied in the conditions of sale and indorsement, except that the draft stated the vendor's name; but the defendant never signed it:—

Held, (1.) that as the offer contained the names of both contracting parties (though one was only agent of an undisclosed vendor), on its acceptance there was a valid contract within the Statute of Frauds; (2.) that the acceptance was absolute and unconditional, inasmuch as a form of contract definitive in all its terms was identified by the offer, and that signature to the form of contract was unnecessary.

Morris v. Wilson (5 Jur. (N.S.) 168) followed.

ON September 24, 1895, Messrs. Frank Jolly & Co. offered for sale by public auction a leasehold house, No. 1 Kenmure Road, Hackney, under printed conditions of sale.

On the conditions a memorandum was indorsed, to be filled up in case of sale, by which the purchaser acknowledged that he had purchased the property "for the sum of £—," and had "paid to Messrs. Frank Jolly & Co., the auctioneers, the sum of £— as a deposit and in part payment of the said purchase-money," and agreed "to pay the balance of the purchase-money and to complete the purchase according to the within conditions of sale."

Neither in the conditions nor in the indorsed form of contract did the name of the vendor (who was Mrs. Mary Ann Filby) appear, but subject to this omission the conditions and indorsement contained all the terms sufficient, if duly signed, to constitute a binding contract for the sale of the house.

ROMER J.

1896

FILBY

v.

HOUNSELL.

The property was not sold at the auction, but subsequently, though on the same day G. C. Hounsell wrote to the auctioneers as follows:—"To Frank Jolly & Co.—Dear Sirs,—I hereby offer the sum of £350 for No. 1, Kenmure Road, Hackney. Lease about 81 years, ground-rent £8, and if my offer is accepted I will pay deposit and sign contract on the auction particulars." On the following day Messrs. Jolly & Co. replied in writing:—"G. C. Hounsell, Esq.—Dear Sir,—On behalf of our client, Mrs. M. A. Filby, we beg to accept your offer of £350 for" the house (again describing it), "subject to contract as agreed. We enclose draft contract herewith, and shall be glad to receive same signed together with cheque for deposit at your early convenience." The draft contract enclosed was identical with that contained in the conditions of sale and the indorsement, but it was never signed by Hounsell. Mrs. Filby brought an action against Hounsell for specific performance of the contract to purchase the house; and the defendant pleaded, amongst other defences, that the Statute of Frauds had not been complied with.

The action was tried before Romer J. on July 13, 14, 1896.

Buckmaster, for the plaintiff, opened the case.

Beddall, for the defendant. There is no contract sufficient to satisfy the Statute of Frauds.

1. The name of the vendor is not stated in any document signed by the defendant, and the statute is not satisfied unless the agreement contains the names of the contracting parties or a description sufficient to identify them, "vendor" not being a sufficient description: *Potter v. Duffield* (1); *Thomas v. Brown*. (2) The present case is very like *Williams v. Jordan* (3), where intending lessees offered in writing to take a lease, but the offer did not name the lessor, and an acceptance in writing by the lessor's agent did not name him, and it was held that there was not an agreement in writing within the statute. "Landlord" or "client" is not a sufficient description of the vendor, even where the purchaser knows the vendor's name

(1) L. R. 18 Eq. 4.

(2) 1 Q. B. D. 714.

(3) 6 Ch. D. 517.

and the agreement is signed by the vendor's agent: *Coombs v. Wilkes* (1); *Jarrett v. Hunter*. (2) [He also referred on this point to *Sale v. Lambert*. (3)]

2. A memorandum like this, which contemplates the preparation of a formal contract, is no contract at all: *Lloyd v. Nowell*. (4)

ROMER J.
1896
FILBY
v.
HOUNSELL.

Buckmaster, in reply. 1. In none of the cases cited was there a contract on which any one could sue. In *Coombs v. Wilkes* (1) there was not even an offer to any one named. Here Messrs. Jolly & Co. could have sued on the contract, for acceptance by an agent on behalf of his principal is sufficient, although the name of the principal is not disclosed: *Morris v. Wilson*. (5) Unless the defendant thought that Messrs. Jolly & Co. were principals, that case is on all fours with this. But the fact that they were agents was known from the first. The fact that the person to whom an offer is made is an agent does not prevent the person making the offer from being bound. If it did, estate agents could not carry on business. *Morris v. Wilson* (5) was referred to, apparently with approval, by Jessel M.R. in *Commings v. Scott*. (6)

2. The contract was not conditional on a more formal contract being entered into. The offer referred to a contract containing all the terms, and it is immaterial that that document was never signed: *Rossiter v. Miller*. (7)

[ROMER J. Very well argued.]

July 31. ROMER J. The only defence on the merits raised by the defendant is that he was induced to contract with the plaintiff (if there be a contract) by certain misrepresentations of the plaintiff's agents. All I need say as to this is that the defendant has failed to prove it.

The next defence raised before me is that of the Statute of Frauds. And this certainly gives rise to some nice questions. But I have come to the conclusion that the plea of the statute does not avail the defendant. The point arising on the plea of

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| (1) [1891] 3 Ch. 77. | (4) [1895] 2 Ch. 744. |
| (2) 34 Ch. D. 182. | (5) 5 Jur. (N.S.) 168. |
| (3) L. R. 18 Eq. 1. | (6) L. R. 20 Eq. 11, 16. |
| (7) 3 App. Cas. 1124, 1137. | |

ROMER J. the statute is that which concerns the name of the vendor.
1896 The defendant says that he has signed nothing which directly
FILBY or by sufficient reference sets forth in writing who the vendor
v. is. And true it is that the plaintiff's name as vendor does not
HOUNSELL. appear in the offer of purchase of September 24, 1895, signed by
the defendant, and that you cannot gather who the vendor is
from the auction form of contract or particulars which are
sufficiently referred to for identification in the offer. But the
offer does contain the names of the contracting parties. The
offer is to Frank Jolly & Co., and I think it makes no difference
that the offer is made to them as agents for an undisclosed
principal. For the purpose of satisfying the Statute of Frauds
it appears to me sufficient, so far as parties are concerned, that
the written contract should shew who the contracting parties
are, although they or one of them may be agents or agent for
others, and it makes no difference whether you can gather the
fact of agency from the written document or not. Who the
principals are may be proved by parol. That is well settled.
This was pointed out by Wood V.-C. in *Morris v. Wilson* (1),
and by Sir George Jessel in *Commings v. Scott* (2), where he
says: "There can be no doubt that if a written contract is
made in this form, 'A. B. agrees to sell Blackacre to C. D. for
1000*l.*,' then E. F., the principal of A. B., can sue G. H., the
principal of C. D., on that contract." The offer, then, in the
case before me signed by the defendant does, in my opinion,
sufficiently give the names of the contracting parties. If that
be so, then the statute is satisfied in that respect, for it is settled
law that a signed offer in writing which sufficiently sets forth
particulars may be accepted by parol, and that the signed offer
simply accepted by parol sufficiently complies with the statute:
see *Warner v. Willington* (3) and *Reuss v. Picksley*. (4) Now,
for the purposes of the point I am now considering, the
defendant's offer was accepted, and it is not necessary that he
should have recognised that acceptance in writing. Nor does
it appear to me material that the acceptance disclosed the name
and was on behalf of the vendor, the previously undisclosed

(1) 5 Jur. (N.S.) 168.

(3) 3 Drew. 523.

(2) L. R. 20 Eq. 15, 16.

(4) L. R. 1 Ex. 342.

principal. A simple acceptance by Frank Jolly & Co. would be clearly sufficient, and, later on, they might have disclosed the fact that they accepted on behalf of their principal. And I cannot see that it makes any difference that they disclose at the time of acceptance the name of the principal or accept directly on behalf of the principal instead of first simply accepting it and then stating who the principal is. I therefore hold that this objection fails. And, indeed, I do not think the point is novel. Substantially the same point was decided by Wood V.-C. in *Morris v. Wilson* (1), mentioned above, in accordance with the view I have expressed. And the cases relied upon by the defendant are distinguishable. In *Potter v. Duffield* (2) you could not gather from anything signed by the defendant's agent who the contracting parties were. The defendant's agent was not mentioned as a contracting party. There was no offer of any kind in writing to him as agent for the vendor or otherwise. And the same observations apply to *Commings v. Scott* (3) so far as relates to the first point taken by counsel on behalf of the plaintiffs in that case, and decided against them by Sir George Jessel. In *Williams v. Jordan* (4) the offer to take a lease was only addressed "Sir," and you could not gather from it to whom the offer was addressed. It certainly was not addressed to the person who subsequently purported to accept it on behalf of the lessor. Lastly, in the case of *Jarrett v. Hunter* (5), though that gives rise to more difficulty, the contract did not shew who the vendor was or who were the contracting parties. I gather that the solicitor for the vendor, who signed, did not purport to sign as a contracting party or on behalf of his undisclosed principal. And the point that the writing signed could or might be taken as a contract between the purchaser and the solicitor as agent for the undisclosed principal vendor was apparently not taken on behalf of the counsel for the plaintiffs or considered by the judge who decided that case. The only other point taken on behalf of the defendant in the case before me is that the acceptance of his offer was not a simple one, but

ROMER J.

1896

FILBY

v.

HOUNSELL.

(1) 5 Jur. (N.S.) 168.

(3) L. R. 20 Eq. 11.

(2) L. R. 18 Eq. 4.

(4) 6 Ch. D. 517.

(5) 34 Ch. D. 182.

ROMER J. was conditional, because of the words "subject to contract as agreed." Now, at first sight those words may appear to make the acceptance conditional. But when the offer is carefully looked at it appears to me that the acceptance was absolute and not conditional. The offer stated in effect that if accepted the defendant would pay a deposit of 35*l.* and sign the form of contract on the auction particulars. Now, that form of contract was in writing, and was definitive in all its terms and clearly identified by the offer. It left nothing to be agreed upon thereafter. The signing it was a form. The contract between the parties was complete on acceptance of the offer, whether the form on the auction particulars was signed or not. I may make in this case somewhat similar observations to those which Lord Cairns L.C. made in *Rossiter v. Miller* (1) with regard to the provision as to a further agreement to be signed by the purchaser in that case: "As regards any legal consequence, the moment he himself had written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1871, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was to my mind perfectly indifferent whether they did so or not. If they did so, if an agreement had to be prepared and signed, it must be an agreement exactly to the effect of the terms and conditions of the paper of 1871." The acceptance, therefore, in the case now before me when it spoke of "subject to contract as agreed" was clearly only referring to the form of contract mentioned in the offer, and which the defendant had offered to sign. The acceptance of the offer was not made subject to any new terms, but was one in accordance with the terms of the offer; this being sufficiently shewn by the important words "as agreed." It follows that the defendant fails in all his defences, and that the plaintiff is entitled to specific performance of the contract, with costs up to and including judgment.

Solicitors for plaintiff: *Lewin & Co.*

Solicitor for defendant: *J. R. Pakeman.*

In re HAMPSHIRE LAND COMPANY.

[0023 of 1893.]

Company—Borrowing—Irregularity—Notice—Common Officer of Two Companies.

VAUGHAN
WILLIAMS
J.

1896

July 9.

Where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the Court will not draw the inference that he has fulfilled these duties.

Gale v. Lewis (9 Q. B. 730; 16 L. J. (Q.B.) 119) distinguished.

The directors of a company were empowered to borrow money on its behalf, but not beyond a certain limit without the consent of a general meeting. A general meeting gave the required consent, but the notices summoning the meeting did not, as required by the regulations of the company, specify that borrowing beyond the limit was to be authorized by the meeting. The money was borrowed from a society the secretary of which was also the secretary of the company, and he knew of the irregularity:—

Held, that the knowledge of the secretary could not be imputed to the society, and that the money lent could be proved for in the winding-up of the company.

THE Hampshire Land Company, Limited, was registered under the Companies Acts, 1862 and 1867, on February 20, 1871. Its memorandum of association did not contain any borrowing power, but clause 82 of the articles of association was as follows:—

“82. The directors may borrow, in the name or otherwise on behalf of the company, such sums of money as they may from time to time think expedient Provided nevertheless that the aggregate of the principal money so borrowed shall not at any time exceed the amount of the paid-up capital, unless the borrowing of a larger amount shall have been previously authorized by a general meeting, in which case the directors may borrow to such an extent as is authorized.”

VAUGHAN
WILLIAMS
J.

1896

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In re

HAMPSHIRE
LAND
COMPANY.

Art. 38 provided, with respect to general meetings, as follows :—

“ 38. Seven days’ notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given by a circular letter addressed to each member and sent to his address in the company’s register”

The company was closely connected with the Portsea Island Building Society. Both the company and the society had their offices in the same building. Four of the directors of the company were also directors of the society, and T. P. Wills was secretary to both corporations.

The society went into liquidation in 1892, and in January, 1893, the company passed an extraordinary resolution in favour of voluntary winding-up. In February, 1893, the voluntary winding-up of the company was ordered to be continued under the supervision of the Court. J. J. Saffery was the liquidator of the company, and W. Edmonds, one of the liquidators of the society, was appointed as an additional liquidator of the company.

The liquidators of the society claimed to be entitled to prove in the winding-up of the company for a debt of over 30,000*l.* for money lent to the company.

Saffery took out a summons in the winding-up of the company, to which summons the society and Edmonds were respondents, for the determination of the question whether the society was entitled to rank as a creditor of the company, and if so for what amount.

The summons was adjourned into Court and heard before Vaughan Williams J.

The evidence shewed that a general meeting of the company was held on February 19, 1881, and Vaughan Williams J. was satisfied that at this meeting a resolution was passed authorizing the directors to borrow 30,000*l.*, although there was no minute in the company’s books of the resolution.

It was also shewn that the notice convening this meeting and sent to the shareholders contained no reference to the fact that it was intended to propose any such resolution ; that at the

date of the meeting the company was already indebted to the society in respect of money lent, and that the paid-up capital of the company was only about 10,000*l*.

After the resolution was passed further sums were advanced by the society, and at the date of the summons the amount due to them was about 30,000*l*.

There was no evidence that Wills communicated to the society with reference to any irregularity in summoning the general meeting.

Bramwell Davis, Q.C., and C. E. E. Jenkins, for Saffery. The respondents will rely on *Royal British Bank v. Turquand* (1) as shewing that the society was entitled to assume that all the requirements of the articles as to internal management had been complied with. That would have been so if the society and the company had been two entirely independent bodies; but they were not, several persons being directors of both the society and the company, and Wills being secretary to both.

Under art. 82 it was ultra vires the directors to borrow an amount exceeding that of the paid-up capital without the assent of a general meeting. There is no minute of any resolution of a general meeting empowering the directors to go beyond this limit, and on the evidence there seems to have been no resolution.

[VAUGHAN WILLIAMS J. I think there was a resolution.]

Even if the resolution was passed it would not be valid unless the meeting was regularly convened in accordance with the articles. Art. 38 required the notices of the general meeting to refer to any special business to be transacted. The notices did not refer to the proposed extension of the borrowing power, which was clearly special business: *Garden Gully United Quartz Mining Co. v. McLister*. (2)

[VAUGHAN WILLIAMS J. The onus is on you to prove the want of notice.]

The notices do not refer to the proposed borrowing; and therefore the general meeting was not regularly convened, and the

VAUGHAN
WILLIAMS
J.

1896

In re

HAMPSHIRE
LAND
COMPANY.

(1) 6 E. & B. 327.

(2) 1 App. Cas. 39.

VAUGHAN
WILLIAMS
J.

1896

In re

HAMPSHIRE
LAND
COMPANY.

borrowing, so far as it was in excess of the power possessed by the directors without the assent of a general meeting, was ultra vires the directors. The resolution, being irregular, was not binding on the company unless the society took without notice of the irregularity. But the society was not in the position of an outside creditor, and, having regard to the position of Wills and the other circumstances, cannot rely on *Royal British Bank v. Turquand*. (1) Wills must have known what the borrowing power of the company was, and that the conditions had not been complied with, and through him the society knew that the company could not lawfully borrow the money. Notice to an officer of a company is notice to the company: Buckley on Companies, 6th ed. p. 74. Knowledge by an agent or officer of one company dealing through him with another company of which he is the officer is the knowledge of the latter company: *Ex parte Waithman* (2); *Gale v. Lewis*. (3) A company can only act by its agents. Wills was the agent of the society to receive this notice. Suppose that as secretary of the company he had written to himself as secretary of the society, that would have been notice to the society. There is nothing which requires the notice to be in writing.

This is not a case of fraud in which different considerations apply—it did not matter to Wills personally whether the society had notice or not. The principle relied on is that the knowledge of an agent is the knowledge of his principal, subject to certain exceptions of which this case is not one.

The shareholders of the company did not ratify what was done. They could not ratify a borrowing ultra vires the directors without knowing that there had been an ultra vires borrowing.

[They also referred to *Irvine v. Union Bank of Australia* (4); *Alletson v. Chichester*. (5)]

Haldane, Q.C., *Eve, Q.C.*, and *E. C. Macnaghten*, for the liquidators of the society. The resolution was properly passed. Assuming the notice did not refer to special business, the

(1) 6 E. & B. 327.

(3) 9 Q. B. 730, 743.

(2) 4 Deac. & Ch. 412.

(4) 2 App. Cas. 366.

(5) L. R. 10 C. P. 319.

society had to look at the company's articles of association but was not bound to see that the interim formalities had been complied with: *Royal British Bank v. Turquand*. (1) Under the circumstances, the knowledge of Wills did not come to him as the secretary or agent of the society, and, that being so, the case is within the authority of *In re Marseilles Extension Ry. Co.* (2)

VAUGHAN
WILLIAMS
J.

1896

In re
HAMPSHIRE
LAND
COMPANY.

[They were stopped by the Court.]

VAUGHAN WILLIAMS J. The question really is, whether the shareholders in the building society or the shareholders in the company ought to bear any loss that would result from the resolution authorizing the directors of the company to borrow this money. So far as the shareholders of both the two corporations are concerned, they are innocent people.

It must be taken that in fact a resolution was passed by the shareholders of the company authorizing the borrowing of the 30,000*l.*, and it must be also taken that no notice was given to them that this special business was intended to be proposed to the meeting which passed the resolution, and that therefore the authority of the directors of the company to borrow this money was not perfected. They had no authority in the absence of a properly passed resolution to borrow this money. But in that state of things, the money having been lent by the society and received by the company, the question which I have stated arises. It is not disputed that the authority of *Royal British Bank v. Turquand* (1) is such that the society had a right to assume in a case like this that all these essentials of internal management had been carried out by the borrowing company, and that it is only in case the law imputes to the society knowledge of these irregularities that the society is not to rank upon the estate of the Hampshire Land Company as a creditor for the amount lent.

The question, therefore, is this: Is it right to impute this knowledge to the society? It is said that it is right, because Mr. Wills was the common officer of both the society and the company, and was aware of these irregularities; and I think it

(1) 6 E. & B. 327.

(2) L. R. 7 Ch. 161.

VAUGHAN
WILLIAMS
J.

1896

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*In re*

HAMPSHIRE  
LAND  
COMPANY.

must be taken that he was aware of them. Then it is said that his knowledge as the officer of the company is equally his knowledge as the officer of the society, and that therefore I ought to impute this knowledge to the society. I do not agree. Both Mr. Bramwell Davis and Mr. Jenkins shrank from saying that wherever there is a common officer of two societies, the knowledge of such officer personally is to be imputed to both the societies employing him. In fact it was quite impossible, having regard to the decision in *In re Marseilles Extension Ry. Co.* (1) that they could successfully contend for so wide a proposition. It is quite plain from the judgments of Mellish and James L.JJ. in that case that both those judges were of opinion that there might be cases in which the personal knowledge of the common officer did not affect both the companies of which he was the officer. I called attention in the course of the argument to the following passage in the judgment of Mellish L.J. in *In re Marseilles Extension Ry. Co.* (2): "I cannot think that is sufficient to affect the Cr dit Foncier with notice of any improper mode in which this money was to be expended, even if Mr. Heritage had . . . notice that it was to be expended for an improper purpose." It is quite plain, when one has read that passage, that the Lord Justice negatives the general proposition that the knowledge of the common officer is always the knowledge of the two companies. But the moment you have done that you have to ask yourself this: Where is the line to be drawn, or what is the test to be applied in order to say whether or not in each case the knowledge of the common officer is the knowledge of each company employing him? It seems to me that, broadly, the Lords Justices do draw the line thus, that the knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice. I think that that view of the case is very much confirmed by a consideration of the report of *Gale v.*

(1) L. R. 7 Ch. 161.

(2) L. R. 7 Ch. 169.

*Lewis*. (1) In that case the jury found that the common agent was authorized, by the company which it was sought to affect with notice, to receive the notice that was given by him as the officer of the other company. Then, that being so, when Lord Denman comes to give judgment he says (2): "It was further contended that Densem communicated to Loosemore in his capacity of attorney, and not as agent for the insurance office. But, where the two capacities are united in one person, a notice received in one capacity for the purpose of being transmitted to the other is an effectual notice in both capacities." Of course, you must add to that statement of Lord Denman's the finding of the jury that the company did authorize Loosemore to receive notice of these assignments; and if you add that, it seems to me that it makes it quite plain that both in *In re Marseilles Extension Ry. Co.* (3) and in *Gale v. Lewis* (1) the test applied by the Court was this: First, was it within the scope of the duty of the officer to give notice to the other company of the information he had got; and, secondly, was it within the scope of his duty, as the officer of the company sought to be affected by notice, to receive such notice? It seems to me that that is not at all the case here. The case is very much more like the one which both Mr. Bramwell Davis and Mr. Jenkins had to admit was an exception to the general rule that they sought to lay down, for they admitted that if Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to

VAUGHAN  
WILLIAMS  
J.

1896

*In re*

HAMPSHIRE  
LAND  
COMPANY.

(1) 9 Q. B. 730.

(2) 9 Q. B. 743.

(3) L. R. 7 Ch. 161.

VAUGHAN  
WILLIAMS  
J.

1896

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In re
HAMPSHIRE
LAND
COMPANY.

breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company. I must, therefore, admit the proof. The costs of all parties will come out of the assets of the Hampshire Land Company.

Solicitors for applicant: *Munns & Longden.*

Solicitors for liquidators of the society: *Leaoyd, James & Mellor.*

F. E.

VAUGHAN
WILLIAMS
J.

1896

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*July 23.*

# *In re* NEW TRANSVAAL COMPANY.

[00145 of 1896.]

*Company—Winding-up—Articles of Association—Meaning of “Surplus Assets.”*

The term “surplus assets,” when used in articles of association providing for distribution among the shareholders on a winding-up taking place, has no such recognised technical meaning that the Court is bound to construe it as referring to the assets after providing only for debts, liabilities, and costs, without recouping paid-up capital.

The capital of a company was 100,200*l.* in 100,000 ordinary shares and 200 founders' shares respectively of 1*l.* each, all of which (except one founders' share) were issued and fully paid up.

One of the articles of association was as follows: “If the company shall be wound up, one-fifth of the surplus assets (if any) shall belong to and be divided among the holders of founders' shares, and the remaining four-fifths of such surplus assets shall belong to and be divided among the holders of ordinary shares in proportion to the amount of capital paid up on the shares held by them.”

Another article had provided that the profits in each year should be applicable in or towards payment of a dividend of 8 per cent. on the amount paid up on the ordinary shares, and that the surplus (if any) should be divided, as to one-fifth among the holders of founders' shares, and as to the other four-fifths among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon.

The company went into voluntary liquidation, and, after providing for all debts, costs, and liabilities, a sum of about 90,000*l.* remained for distribution among the shareholders:—

*Held*, that, having regard to both articles, “surplus assets” meant the assets remaining after providing for debts, costs, and liabilities, and also recouping the paid-up capital subscribed by all the shareholders.

THE New Transvaal Company, Limited, was registered in 1895 under the Companies Acts, 1862 to 1890, with a capital of



100,200*l.* divided into 100,000 ordinary shares of 1*l.* each and 200 founders' shares of 1*l.* each. Two of the articles of association were as follows :—

“86. The profits of the company in each year shall . . . be applicable first in or towards payment of a dividend of 8 per cent. on the amount of the ordinary shares, and the surplus (if any) shall . . . be divided as follows, viz., one-fifth part thereof among the holders of founders' shares, and the remaining four-fifths thereof among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon.”

“114. If the company shall be wound up one-fifth of the surplus assets (if any) shall belong to and be divided among the holders of founders' shares, and the remaining four-fifths of such surplus assets shall belong to and be divided among the holders of ordinary shares in proportion to the amount of capital paid up on the shares held by them. The liquidators, whether voluntary or official, may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as the liquidators with the like sanction shall think fit.”

The company afterwards passed resolutions in favour of voluntary winding-up and appointing liquidators. All the admitted debts and liabilities of the company had been paid and satisfied, and all the shares, except one founders' share, had been issued and fully paid up, and the assets available for distribution among the shareholders amounted to about 90,000*l.* in cash. The liquidators took out a summons for the determination of the question whether on the true construction of art. 114 the assets of the company, after discharging its debts and liabilities and the costs of winding-up, were divisible as between the holders of founders' shares and ordinary shares on the basis of the founders' shares receiving one-fifth of the said assets and the ordinary shares the remaining four-fifths thereof, or whether the expression “surplus assets” meant the assets remaining after making good the paid-up capital of the company as well as discharging the debts, liabilities and costs, and accordingly the assets were divisible between the holders of

VAUGHAN  
WILLIAMS  
J.

1896  
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*In re*  
NEW  
TRANSVAAL  
COMPANY.  
—

VAUGHAN  
WILLIAMS  
J.

1896

*In re*  
NEW  
TRANSVAAL  
COMPANY.

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founders' shares and ordinary shares rateably according to the amounts paid up on all such shares respectively. The summons also asked that one of the respondents, Theodore Bahlsen, might be appointed to represent the holders of founders' shares, and the other respondent, Leopold Pain, to represent the holders of ordinary shares.

The summons was adjourned into Court and heard before Vaughan Williams J. on July 23, 1896.

*Rowden*, for the liquidators, stated the facts of the case and the question to be answered.

*Eve, Q.C.*, and *Godefroi*, for Bahlsen, as representing the holders of founders' shares. The term "surplus assets" has now a technical meaning: it means what remains in the hands of the liquidator after discharging the liabilities of the company, and the term is so used in the forms of articles of association now commonly used: *Palmer's Company Precedents*, 6th ed. Part I. p. 380, Form 152; *ibid.* p. 409. Unless special provision to the contrary is made, the surplus assets are so distributed as to throw any loss of capital on the members in proportion to the nominal amount of capital held by them: *Ex parte Maude* (1); *In re Weymouth and Channel Islands Steam Packet Co.* (2) As a rule, or at any rate very frequently, the articles provide that if the surplus assets are not enough to repay all the paid-up capital, the loss is to be borne in proportion to the capital paid up or which ought to have been paid up. It was open to those who formed the company to adopt a provision to this effect; but they chose to substitute a special provision which is binding on both classes of shareholders. This special provision (art. 114) says nothing about the repayment to the members of the capital paid up by them, but provides that one-fifth of the surplus assets—that is, the surplus assets without any deduction in respect of paid-up capital—shall go to the holders of founders' shares. The words are plain, and our contention is supported by the latter part of art. 114, which provides for the division of assets in specie. It will be urged that only such part of the assets as represented profit was meant to be divided in this way, just as the yearly profits, after payment of 8 per

(1) L. R. 6 Ch. 51.

(2) [1891] 1 Ch. 66.

cent. on the ordinary shares, were under art. 86 to be divided so as to give the holders of founders' shares one-fifth. But this article, if it affects the case at all, is in our favour—while the company was a going concern the ordinary shareholders had the larger proportion of dividend. They must rest satisfied with the advantages given them by that clause, and have no right to grumble that on winding-up the position of the holders of founders' shares is improved.

[They also referred to *In re Sheppard's Corn Malting Co.* (1); *Birch v. Cropper.* (2)]

*Herbert Reed, Q.C.*, and *Hansell*, for the ordinary shareholders. "Surplus assets" in this case mean what remains after payment of, not only the debts and liabilities of the company to its outside creditors, but also the amount of capital paid to the company by its own shareholders. If the contention on behalf of the holders of the founders' shares were acceded to, the result would be very startling; for they would get back at the expense of the ordinary shareholders a much greater amount of capital than they paid altogether in respect of their shares. To effect such a result the articles must be very clearly framed.

Primâ facie, shareholders are entitled to equality in distribution: *Birch v. Cropper.* (3) No doubt articles may be so framed as to throw the losses on the shareholders, or give them the profits, in different proportions; but that has not been done here. The explanation of the division into fifths in art. 114 is explained by art. 86, which shews that profits were to go as to one-fifth to the holders of founders' shares, and as to the other four-fifths to the ordinary shareholders. Reading the two articles together, it is reasonably plain that in case of a loss of capital it was not intended that the holders of founders' shares should get more than the capital they subscribed to the further loss of the ordinary shareholders.

[They also referred to *Sheppard v. Scinde, Punjaub and Delhi Ry. Co.* (4); *Griffith v. Paget.* (5)]

(1) 70 L. T. (N.S.) 3.

(3) 14 App. Cas. 537.

(2) 14 App. Cas. 525.

(4) 36 W. R. 1.

(5) 6 Ch. D. 511.

VAUGHAN  
WILLIAMS  
J.

1896

*In re*

NEW

TRANSVAAL  
COMPANY.

VAUGHAN  
WILLIAMS  
J.

*Eve, Q.C.*, in reply.

1896  
~  
*In re*  
NEW  
TRANSVAAL  
COMPANY.

VAUGHAN WILLIAMS J. In this case I have to decide what is the meaning of the words "surplus assets" in art. 114.

It is contended on behalf of the holders of the founders' shares that the words "surplus assets" mean surplus after paying the debts and outstanding liabilities only. It is contended on the part of the ordinary shareholders that the words "surplus assets" mean the surplus left, not only after deducting the amount necessary to pay the debts and outstanding liabilities, but also after recouping the shareholders the amount of capital which they have contributed. In my judgment the words "surplus assets" may mean either that which is contended for by the holders of the founders' shares, or that which is contended for by the holders of the ordinary shares.

I entirely dissent from the suggestion that the term "surplus assets" has come to have such a recognised technical meaning that I must attribute to it in this article the meaning contended for by the holders of the founders' shares. I assent to the suggestion of Mr. Eve that the term "surplus assets" is very frequently used in the sense contended for by him, and it may be much more frequently used in that sense than in the sense contended for by his opponents. But I only say that the term has not such a recognised meaning that I am bound in this case to give the words the meaning he supports without regard to the context of the other provisions in the articles of association. I propose, therefore, to look at the articles of association and see what their meaning is. Now what I find is, that the founders' shares and the ordinary shares were all 1*l*. shares and were all fully paid up.

In that state of things one first inquires what provision is made as regards the interests of the two classes of shareholders whilst the company is a going company?

Now, so far as profits are concerned, that is dealt with in art. 86. In construing art. 114, I think that art. 86 must be taken into consideration, because it is from that article that the proportion of one-fifth and four-fifths was taken. In



art. 86 that proportion was applied to profits, and it seems to me that the presence of that same proportion in art. 114 shews that it is probable that art. 114 was intended to deal with a surplus analogous to the division of profits in the lifetime of the company. If that view is correct, "surplus assets" must be read as meaning, not surplus after the mere payment of debts—because the presence of a surplus after payment of the debts is quite consistent with the loss by the company of capital—but surplus after not only payment of debts but recoupment of the capital paid. That is one reason which induced me to think that "surplus assets" was used in that sense in art. 114. Moreover, I cannot help feeling that to hold that "surplus assets" meant in this case surplus after the mere payment of debts and outside liabilities would lead to a result so unfair and inequitable that one ought not to arrive at that conclusion unless one is driven to it by the strong words of the article itself. The result of such a construction might be, that although the company had been worked at a loss, and those who had paid up their shares had been large cash losers, yet the holders of the small number of founders' shares might, by taking one-fifth of the surplus remaining after payment of debts, make a very large profit.

When I first read art. 114 I was much struck by Mr. Eve's argument, because *prima facie* one cannot help coming to the conclusion that where all the capital has been recouped and everybody has been put on a dead level of having made no cash subscription whatever to the company, the division of profits ought, according to ordinary principles, to be a division *pari passu* according to the number of shares held in the company by each holder of ordinary shares. I still think that the amount of capital paid up ceases to be a material factor in arriving at an equal division after the paid-up capital has been repaid; but on the whole I have come to the conclusion that the draftsman meant to exclude the rule laid down by the House of Lords in *Birch v. Cropper* (1), and to adopt the rule laid down by the Court of Appeal in the same case. (2)

(1) 14 App. Cas. 525.

(2) Reported sub nom. *In re Bridgewater Navigation Co.*, 39 Ch. D. 1.

VAUGHAN  
WILLIAMS  
J.

1896

*In re*

NEW,  
TRANSVAAL  
COMPANY.

VAUGHAN  
WILLIAMS  
J.

1896

*In re*

NEW  
TRANSVAAL  
COMPANY.

Beyond a doubt one part of art. 114 does not adopt the rule of the House of Lords, because it does not provide for distribution *pari passu*. My view is that when one-fifth of the surplus assets is given to the holders of founders' shares, that is an arbitrary mode of arriving at the proper rate of distribution. You do not lump both classes of shareholders together and divide the surplus assets *pari passu*, but you give one-fifth to the holder of founders' shares and divide the other four-fifths amongst the ordinary shareholders. I only mention this as shewing that the object of art. 114 was to have a mode of distribution expressly fixed. If it had been intended to have a distribution in accordance with the recognised rule applying to cases where there is no express provision, why have an express provision? As there is an express provision, ought I to abstain from the decision I should otherwise arrive at because of the apparent injustice of dividing fourth-fifths of the surplus amongst the holders of ordinary shares in proportion to the amount of capital paid up, after that capital has been recouped?

I say in relation to that that it is not so unjust that it is inconceivable that the framers of the article could have intended it, because it is only the conclusion which the Court of Appeal arrived at in *In re Bridgewater Navigation Co.* (1)

As I understand, the Court of Appeal decided that after providing for the repayment of the capital standing to the credit of each partner—that is each member of the company—the surplus assets must be distributed in the proportion in which the capital had been contributed by the partners—that is to say, in proportion to the capital at risk.

That being so, I cannot refuse to arrive at the conclusion that the term “surplus assets” means surplus profits—that is to say, surplus assets after payment of debts and recoupment of capital.

Solicitors for liquidators : *Lewis & Lewis.*

Solicitor for holders of founders' shares : *J. H. Moggridge.*

Solicitors for ordinary shareholders : *Cronin, Orgill & Cronin.*

*In re* CONCESSIONS TRUST.

## McKAY'S CASE.

[00295 of 1893.]

VAUGHAN  
WILLIAMS  
J.

1896

Aug. 8, 12.

*Company—Winding-up—Contributory—Estoppel—Certification on Transfer.*

Where a transfer for value purporting to relate to fully paid shares in a company bears on the face of it a certification by the secretary of the company that the share certificate has been lodged with the company, the certification amounts to a statement that a certificate of the shares described in the transfer has been lodged, and the company is estopped from denying that the shares are fully paid up, even though no certificate has been lodged with the secretary or the certificate lodged does not say whether the shares are fully paid up or not.

*Bishop v. Balkis Consolidated Co.* (25 Q. B. D. 512) observed upon.

IN the winding up of the Concessions Trust, Limited, the liquidators placed the name of John McKay on the list of contributories in respect of 300 shares at 5s. each. McKay took out a summons asking that the list and the liquidators' certificate finally settling the same might be varied in respect of the inclusion of his name therein as an unpaid shareholder, and that his name might be struck out or entered as a fully paid shareholder.

In July, 1890, the applicant purchased seventy-five of the shares (numbered 7082 to 7156) and twenty-five more of them (numbered 7022 to 7046) in the ordinary way of business through Mr. Hewitt, a stock and share broker, at a premium of 1s. a share. The two transfers of the shares, executed by one Kentish, the transferor, and by the applicant as transferee, described the shares as fully paid. Each of the transfers bore a certificate, signed by the company's secretary, that the certificate of the shares had been lodged with the company.

Certificates for the shares had been issued to Kentish. They did not state on the face of them whether the shares were fully paid up or not, but on the back of each of them there was an indorsement, signed by the secretary but not under the seal of the company, stating the numbers of the shares and that they were fully paid up.

VAUGHAN  
WILLIAMS  
J.

1896

McKAY'S  
CASE.

As a matter of fact, only 3s. per share had been paid on the 100 shares, and the certificates held by Kentish had not been lodged with the company as stated in the certification.

In August, 1890, the applicant purchased the other 200 shares (numbered 76679 to 76878) from Mr. J. Stuart, the managing director of the company, paying 2s. a share for them.

In the transfer these shares also were described as fully paid up, though only 3s. a share had been paid. The transfer bore the same form of certification as the transfers of the 100 shares, but no certificate in respect of the 200 shares had been issued to any one prior to the transfer.

The certificates issued to the applicant did not state whether the shares were fully paid up or not.

The summons was adjourned into Court, and heard by Vaughan Williams J. on August 8, 1896.

*Kirby*, in support of the summons. The company represented to the applicant that the shares were fully paid up, and it is now estopped from denying that they were not fully paid up. If a certificate of shares states that they are fully paid up, it may estop the company from denying the statement: *Parbury's Case*. (1)

A certificate is not essential to estoppel even in the case of a company. The company is estopped by the statement of its secretary contained in the certification. The certification turns out to be incorrect, but the company is bound by it. The certification amounts to "a representation that the transferor has produced to the person certifying such documents as on the face of them shew a *primâ facie* title in the transferor to transfer the shares mentioned in the transfer": *Bishop v. Balkis Consolidated Co.* (2) In this case, therefore, as the transfer refers to paid-up shares, the certification was a statement that certifies of some shares had been lodged with the company, that its officer had looked at them, and that they referred to paid-up shares.

As to some of the shares, there were certificates which by the indorsement stated that the shares were fully paid. It cannot

(1) [1896] 1 Ch. 100.

(2) 25 Q. B. D. 512, 519.



make any difference whether the statement is on the face or the back of the certificate; and as to those shares, therefore, the case seems to be within *Burkinshaw v. Nicolls*. (1)

As to the other shares, no certificate appears to have been issued prior to the transfer; but the applicant is entitled to rely on the representation made by the certification. [He also referred to *Balkis Consolidated Co. v. Tomkinson*. (2); *In re Macdonald, Sons & Co.* (3); Palmer's Company Precedents, 6th ed. vol. i. pp. 323, 324.]

*Ashton Cross*, for the liquidators. The company is not estopped in either case. No certificate had been lodged with the secretary, but that makes no difference. His duty was only to see that the certificates were in order; it was no part of his business, nor is it the practice of secretaries, to make a statement as to whether the shares in respect of which a certificate is lodged are fully paid up. The effect of certification is pointed out in *Bishop v. Balkis Consolidated Co.* (4); but that case is an authority against the applicant. *Burkinshaw v. Nicolls* (1) lays down the law with reference to a transferee; but, as to some of these shares, the applicant was an original allottee.

Aug. 12. VAUGHAN WILLIAMS J. The question in this case is whether Mr. McKay is liable to be placed on the list of contributories in respect of three lots of shares—seventy-five, twenty-five, and 200. The shares in question were 5s. shares, and it is said that only 3s. has really been paid in respect of any of the shares; and this seems to be the case, although there is some evidence that the shares were at one time treated as fully paid by the company. Mr. McKay purchased in the market, through a broker of the name of Hewitt, the seventy-five and the twenty-five shares; and the transferor was a man of the name of Kentish. Both these transfers bore the certification, signed by the company's secretary, that the certificates had been lodged with the company. No certificates had in fact been lodged, but certificates had in fact been issued by the company to Kentish. These certificates said nothing on the

VAUGHAN  
WILLIAMS  
J.

1896  
McKAY'S  
CASE.

(1) 3 App. Cas. 1004.

(2) [1893] A. C. 396.

(3) [1894] 1 Ch. 89.

(4) 25 Q. B. D. 512, 519.

VAUGHAN  
WILLIAMS  
J.

1896

McKAY'S  
CASE.

face of them as to whether the shares were fully paid or not ; but on the back of them there was a statement, signed by the secretary of the company, mentioning the numbers of the shares and stating that they were fully paid. This indorsement is subsequent in date to the certificates, and is not under seal, but is prior in date to the certification, being of a date two days after the certificate and seven months prior to the certification. It is said that this indorsement is not authorized by any entry in the minute-book ; but many such indorsements appear on the certificates now in the hands of the liquidator. Now, first let me consider the certification apart from any consideration of the indorsement. The certification, according to the judgment of Lindley L.J. in *Bishop v. Balkis Consolidated Co.* (1), certifies " that the transferor has produced to the person certifying either what purports to be a certificate of the title of the transferor to the shares mentioned in the transfer or the equivalent of such a document, in other words, what purports to be a certificate of the title of someone else to those shares, and one or more documents purporting to transfer those shares from such person to the transferor." And in the same judgment (2) Lindley L.J. says that the certification " must be read in connection with the transfer on which it is put." Now, what is the effect of the certification that a certificate has been lodged where none has been lodged? Lindley L.J., in the same judgment, says (3) that such statement does raise an estoppel against the company, but that " the doctrine of estoppel cannot put the company in a worse position than if a certificate of Lupton's transferor, Powter, had been produced. If it had, still the transfer from Powter to Lupton would have been invalid, and Lupton, without any default on the part of the company, would not have been able to transfer the shares to Cuthbert. The fact, then, which the company is estopped from denying would not, if true, have entitled the plaintiff to the 135 shares." I understand this to mean that the certificate in that case, although it might have shewn on the face of it that the transferor had a good title, would not really have given any title to the transferee,

(1) 25 Q. B. D. 512, 519.

(2) 25 Q. B. D. 519.

(3) 25 Q. B. D. 521.

because the transferor had actually parted with the certificate to other persons. This is what the judgment seems to me to say; but I am afraid that I do not understand it, because the only certificate which the transferor could have produced would have been either a forgery or a certificate to which the transferor had no title; and the transferor, if he had been called upon to produce a certificate and lodge it with the person certifying, as he clearly ought to have been called upon to do, might have hesitated to do such a criminal act, and the transferee paid his money on the faith of a certification that a certificate had been lodged. The conclusion of the Lord Justice seems based upon the proposition that the certification does not guarantee the title of the person lodging the certificate. I, however, am bound by this judgment, and cannot find that the certification puts the company in any worse position than they would have been in if the certificate had really been lodged with them. The only question for me, therefore, is what certificate must have been produced to satisfy this certification? It clearly must be a certificate of the ownership of shares bearing the numbers mentioned in the transfer; but, although the transfer says "fully paid," the certificate, apart from the indorsement, says nothing of the shares being fully paid. Does the certification imply that the certificate produced was a certificate of the ownership of fully paid shares? I have no evidence on this point, but believe that there is no doubt that, according to the practice of the Stock Exchange, such a certification on a transfer purporting to be a transfer of fully paid shares would be taken to certify the lodgment of a certificate of ownership of fully paid shares. If, however, the liquidators desire to give evidence on this point, I will give them the opportunity of so doing. The secretary certifies that the documents produced to him are in order—i.e., that they are right on the face of them; but if I am right in my view, the documents would not have been in order unless a certificate of fully paid shares had been produced. The same reasoning seems to me to apply to the 200 shares. According to the case of the company, no certificate which was in order could have been produced. The transferor could have obtained his certificate for partly paid

VAUGHAN  
WILLIAMS  
J.

1896

McKAY'S  
CASE.

VAUGHAN  
WILLIAMS

J.

1896

McKAY'S  
CASE.

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shares, and nothing else, and this would not have been in order ; and I think that to hold that the company is estopped from saying that there was no certificate of the ownership of these shares as fully paid is not to make the company by their certification warrant the title of the transferor, but merely to make them warrant the production to them of a certificate respecting these shares as fully paid ; and the certificate which the transferor could have obtained was not such a certificate. I hold, therefore, that Mr. McKay is not liable to be placed on the list as a contributory. Taking this view, it is not necessary for me to determine the effect of the indorsement.

Solicitor for applicant: *Alfred H. Cooke, for W. H. Smith, Woburn, Beds.*

Solicitors for liquidators: *Wansey, Bowen & Co.*

F. E.



*In re* CHAPMAN.  
COCKS *v.* CHAPMAN.

[1893 C. 1103.]

C. A.

1896

July 6, 20, 21;  
Aug. 7.

*Will—Power to invest on Real Securities—Executor—Trustee—Mortgages existing at Testator's Death—Retaining Investments—Depreciation—Insufficient Security—Breach of Trust—Wilful Default.*

Where a will authorizes investments on mortgage of real estate, and part of the testator's estate at his death consists of mortgages of freehold farms, there is no rule that his executors and trustees are under an absolute duty, without exercising any judgment of their own in the matter, to call in the securities within twelve months from the death (unless realization is required for payment of debts, funeral and testamentary expenses, and legacies), even though some of the securities may be of a risky nature, as where, owing to agricultural depression, they have apparently become insufficient to satisfy the mortgage debts:

Nor is there any rule that trustees retaining a security authorized by their trust are liable to make good a loss sustained through the fall in value of the security, provided that in so doing they have acted honestly and prudently in the belief that they have taken the best course for all parties interested in the trust estate.

To render trustees liable in such a case, wilful default, including want of ordinary prudence, must be proved.

The duties of executors and trustees, as regards calling in mortgage debts of their testator, discussed.

*Ames v. Parkinson* (7 Beav. 379) distinguished.

APPEAL from Kekewich J. (1)

For the purpose of the present report, it is necessary to state the following additional facts.

By the order of August 7, 1893, made on the first hearing of the summons which was the subject of the former report, inquiries were directed—(1.) what mortgage securities formed part of the residuary personal estate of the testator at his death, and how far such securities now remained outstanding, and whether it would be fit and proper that any and what proceedings should be taken for getting them in; (2.) under what circumstances such of the said mortgage securities as now remained outstanding had been allowed so to remain outstanding,

(1) [1896] 1 Ch. 323.

C. A.  
1896  
*In re*  
CHAPMAN.  
COCKS  
*v.*  
CHAPMAN.

and whether any and, if so, what steps had been taken by the trustees of the will of the testator, James Chapman, to ascertain the value or to realize or get in the same, or to enforce payment against the mortgagors, either immediately after his death or at any time subsequently thereto; and whether any and which of such mortgage securities had been improperly allowed to remain outstanding; and, if so, at what time the same respectively ought to have been called in; and (3.) what was the value of the hereditaments and property comprised in the said mortgage securities respectively which should be found to have been improperly allowed to remain outstanding at the time when the same respectively ought to have been called in.

By his certificate dated July 3, 1895, the chief clerk certified, in answer to the first inquiry, that the mortgage securities which formed part of the personal estate of the testator, James Chapman, at his death consisted of the several mortgages set forth in the schedule to the certificate. The first mortgage in the schedule was denoted by the letter "A." It was a mortgage by one William Heading, a farmer, to the testator, for 10,000*l.* at 4 per cent., consisting of an original mortgage dated October 10, 1872, for 9000*l.*, and a further charge on January 1, 1880 (shortly before the testator's death), for 1000*l.* The mortgage comprised a freehold farm of 242 acres in Norfolk, which had been purchased by the mortgagor for 15,504*l.* at the date of the original mortgage. This property was let on lease by Heading, the mortgagor, in 1877, at a yearly rent of 550*l.*, until Michaelmas, 1885, when, in consequence of the mortgagor being in arrear with his interest and having got into pecuniary difficulties which resulted in his making an arrangement with his creditors, the trustees of James Chapman's will took possession of the farm and let it, first, for four years at a rent of 350*l.* per annum, and next on a yearly tenancy at a rent of 267*l.* per annum: at present it was let on another yearly tenancy at a rent of 12*s.* 6*d.* per acre.

The next mortgage in the schedule was denoted by the letter "B." This was a mortgage to the testator, James Chapman, by one John Boldero, a farmer, dated March 1, 1879, for

5500*l.* at 5 per cent. It comprised a freehold farm of about 200 acres in Suffolk, which had been purchased by the mortgagor for 8500*l.* at the date of the mortgage. The trustees of James Chapman's will took possession of this property in 1885 on the death, insolvent, of the mortgagor, Boldero. The trustees then let it on lease for a term of which six years had yet to run, at a yearly rent of 160*l.*

The next mortgage in the schedule was denoted by the letter "C." This was a mortgage to the testator, James Chapman, by John Philip Francis and Edward Cubitt Francis, dated October 12, 1871, for 6000*l.* at 4 per cent., since reduced to 3½. It comprised a farm of 215 acres in Norfolk, of which 210 were freehold and 5 copyhold. The freehold portion had been bought by the mortgagors for 8200*l.* at the date of the mortgage, and a further sum of 400*l.* was subsequently spent by them in enfranchising the copyhold portion. This farm was at present in the occupation of the mortgagors, and appeared to be a good security for the amount of the mortgage debt.

The next mortgages in the schedule were a series of four from one Frederick Aves to the testator, James Chapman, for a total sum of 1450*l.* The properties comprised in these mortgages were taken possession of by the trustees in 1888 upon the failure of the mortgagor, Aves. In January of that year Aves entered into an agreement for the benefit of his creditors, when Henry Chapman, the principal acting executor and trustee of James Chapman's will, valued the securities at 1349*l.* and proved against Aves' estate for the balance.

Then followed a number of other mortgages for an aggregate sum of 2020*l.*, under some of which possession had been taken by the trustees, in one instance on the bankruptcy of the mortgagor.

All the mortgages enumerated in the schedule the chief clerk certified to be now remaining outstanding, and he also certified that as to two mortgages in the occupation of the mortgagors (one being the "C" mortgage, the other a mortgage denoted by the letter "J," and which also appeared to be a good security) notice should forthwith be given by the defendant Martha Ann Chapman, the surviving executor and trustee of James

C. A.  
1896  
*In re*  
CHAPMAN.  
COCKS  
*v.*  
CHAPMAN.

C. A.  
1896  
*In re*  
CHAPMAN.  
COCKS  
*v.*  
CHAPMAN.  

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Chapman's will, calling them in, and that the rest of the mortgages should forthwith be sold.

In answer to the second inquiry the chief clerk certified as follows: The circumstances under which the said mortgages were allowed to remain outstanding were that Henry Chapman, deceased, and the defendant Martha Ann Chapman, the executors and trustees of James Chapman's will, had relied upon the testator's judgment in accepting the securities, and upon their own judgment that the properties comprised in the mortgages were sufficient securities for the sums advanced. Subsequently, and in consequence of the general depreciation in the value of property in the localities in which the mortgaged hereditaments were respectively situated, and the financial difficulties and failures of the several mortgagors, the said trustees believed it to be impossible, except as to the two mortgages "C" and "J," to recover the amounts due under the mortgages or to realize the securities except at a considerable sacrifice, and the said trustees elected to hold the securities until a more favourable time arrived for realizing the same. The chief clerk then stated that it did not appear that any steps had been taken by the trustees to ascertain the value or to realize or get in the said mortgage securities, or to enforce payment against the mortgagors, either immediately after the testator's death or at any time subsequently thereto, except that in 1885, upon the death of Boldero, the mortgagor of the "B" mortgage, they gave notice calling in that mortgage; but on finding that his personal estate amounted to 1971*l.*, and that his estate was insolvent, they took no further steps to recover the amount of the mortgage debt; and that in 1888, under an assignment by Aves for the benefit of his creditors, the trustees established a claim and received a dividend of 13*s.* 7*d.* in the pound in respect of his mortgages. The chief clerk then certified as follows: "The whole of the said mortgage securities now remaining outstanding as aforesaid have been improperly allowed to remain outstanding, and ought to have been called in within twelve months from the death of the testator, James Chapman, that is to say, not later than the end of July, 1881." The question of the liability of the trustees



for any breach of trust in continuing to hold the said mortgage securities as investments authorized by the will, the chief clerk reserved for the Court.

As to the third inquiry, the chief clerk stated that, having regard to the difficulty and expense of obtaining evidence as to the value of the several mortgaged properties at the time when the mortgages ought respectively to have been called in as aforesaid, he had, at the request of the parties, forbore to proceed on this inquiry.

The defendant Martha Ann Chapman, as the surviving trustee, was at present in possession, by her tenants, of all the mortgaged properties, except those comprised in the mortgages "C" and "J." Among the affidavits forming the evidence on which the chief clerk based his certificate, was one filed in February, 1894, on behalf of the defendant, Sydney Cozens-Hardy, by Mr. Edward Banham, a retired auctioneer and valuer in Norfolk. He deposed that he had been well acquainted with the testator James Chapman, who had formerly been a shopkeeper and tea merchant, and also with his brother Henry Chapman, who had been a farmer, but both had in the latter part of their lives retired from business; that both had been in the habit of lending large sums of money on mortgage of freehold agricultural land, frequently, in the deponent's judgment, in excess of what was prudent and customary; that neither was well acquainted with the value of land; that they were both of eccentric and penurious habits and not accustomed to consult experts or take advice as to their investments; that, with regard to the "A" mortgage, he was well acquainted with Heading, the mortgagor, and had acted for him in many matters of business; that Heading was never actually bankrupt, but in July, 1885, he executed a bill of sale with a view to carrying out an arrangement with creditors, and that all his creditors, with the exception of three who accepted a composition, were paid in full; that he was possessed of considerable personal estate at the date of James Chapman's death in 1880, and the deponent believed that if the trustees had then called in the mortgage they would have found no difficulty in obtaining the full amount due. The deponent further stated that

C. A.

1896

*In re*

CHAPMAN.

COCKS

*v.*

CHAPMAN.

C. A.  
1896  
*In re*  
CHAPMAN,  
COCKS  
v.  
CHAPMAN.

the depreciation in the value of land in Norfolk and Suffolk since 1880 was notorious, and must have been well known to Henry Chapman, and that any person placed in such circumstances as the trustees would have realized his mortgage securities many years ago.

On the other hand, an affidavit, filed in July, 1894, by the plaintiffs' solicitor, Mr. Edward Cubitt Francis of Norwich, who was also one of the mortgagors of the "C" mortgage, stated that his firm acted for the testator, James Chapman, in 1871, in the preparation of the "C" mortgage, but that this was the only matter in which they had acted for him; that on James Chapman's death in July, 1880, the firm acted for the executors in proving the will, and there was no suggestion, even at that period, that any of the mortgages were of insufficient value, though the deponent had now reason to believe that many of them must at that time have proved deficient if forced into the market; that the whole period which had elapsed since the testator's death had been marked by a continuous fall in the value of agricultural land, and it had been from year to year increasingly difficult to find any purchaser whatever, even at prices far below those which were current prior to 1879; that such land, generally, was not worth more than half what it was twenty years ago, though it was not improbable that times might shortly mend, or at all events they were not likely to get worse.

John Cocks, one of the residuary legatees under James Chapman's will, and who had mortgaged his interest to Sydney Cozens-Hardy, also made an affidavit, in which he stated that both the testator and his brother had had great experience and were well acquainted with the value of property in Norfolk and Suffolk. From the evidence generally, it appeared that the testator always regarded his brother, Henry Chapman, as a man of considerable judgment upon the question of the value of land, and that the decision of the trustees to postpone the realization of the securities was arrived at mainly upon Henry Chapman's opinion.

On December 17, 1895, the summons came on for hearing on further consideration before Kekewich J., upon the chief

clerk's certificate and the evidence on which it was based, with the result, as already reported, that his Lordship made an order directing the defendant M. A. Chapman to give notice calling in the mortgages "C" and "J," and a sale of the hereditaments comprised in the rest of the mortgages in the schedule to the chief clerk's certificate; also declaring that the plaintiffs, Henry Chapman's executors, and the defendant Martha Ann Chapman, were jointly and severally liable to make good to their trust estate, the estate of James Chapman, all loss accrued or to accrue by reason of Henry Chapman and M. A. Chapman having improperly allowed the mortgages to remain outstanding after the end of July, 1881; and also that as the plaintiffs admitted assets of their testator, Henry Chapman, they were liable personally to make good the loss. The order further directed the third inquiry to be proceeded with, and a receiver to be appointed of the estate of James Chapman.

Martha Ann Chapman then changed her solicitors and gave notice of appeal from so much of that order as consisted of the declaration of liability and the consequential directions. Upon the appeal being opened on July 6, 1896, their Lordships held that they were precluded from dealing with the whole of the points arising in the case inasmuch as no summons had been taken out, as there should have been, to vary the chief clerk's certificate, and they considered that, having regard to the position of the action, the certificate was a practical bar to any relief being given. In order, however, to prevent, as they said, any injustice to the parties, their Lordships directed the appeal to stand over for a fortnight, with liberty to the plaintiffs and the defendant M. A. Chapman to take out a summons to vary, returnable before their Lordships, and also with liberty to the defendant S. Cozens-Hardy to cross-examine any of the deponents whose affidavits had been used before the chief clerk. Liberty was also given to the plaintiffs to appeal; and the plaintiffs and M. A. Chapman were ordered to pay the costs of the hearing on further consideration. Thereupon, on July 9, 1896, M. A. Chapman took out a summons to strike out the whole of the chief clerk's findings as to the improper retention of the mortgage securities, and to substitute therefor a finding that

C. A.  
1896  
*In re*  
CHAPMAN.  
COCKS  
*v.*  
CHAPMAN.

C. A.  
1896  
*In re*  
CHAPMAN.  
COCKS  
*v.*  
CHAPMAN.

none of the mortgage securities had been improperly allowed to remain outstanding. On July 13, 1896, the plaintiffs took a similar summons, and also gave notice of appeal from the order of Kekewich J.

The appeals and summonses were heard on July 20 and 21, 1896.

Miss Chapman and Mr. E. C. Francis were both cross-examined before their Lordships. From Miss Chapman's evidence it was clear that she left the management of the trust estate to her uncle, Henry Chapman.

Mr. Francis stated that land in Norfolk and Suffolk was at its highest value from 1871 to 1874; that 1879 was a very bad year, and might be regarded as the commencement of the depreciation in the value of land; that in 1880 there was a certain amount of depreciation but not much, but that by 1885 a great fall had taken place, and land had been going down ever since. It also appeared that, some years after the testator's death, Henry Chapman, finding that the mortgaged properties had so much decreased in value, consulted (among others) two large farmers of great experience in Norfolk named Carter (father and son) of whose judgment James Chapman had himself entertained a high opinion, and also Mr. E. C. Francis himself, as to what should be done; and their opinion as well as Henry Chapman's was—and it agreed, Mr. Francis said, with the general opinion in Norfolk—that the fall in the value of land would be temporary only, and that it was unwise for mortgagees to attempt to realize their securities. Mr. Francis further stated that, in his opinion, James Chapman's trustees adopted the wisest course in finally deciding to retain the securities and wait for better times.

*Swinfen Eady, Q.C.*, and *E. C. Macnaghten*, for the appellant, Miss Chapman, were stopped by the Court.

*Warmington, Q.C.*, and *Micklethorp*, for the defendant, S. Cozens-Hardy. An executor or trustee cannot justify an investment on mortgage of real estate of insufficient value at the time unless he can shew that in so doing he was acting not merely upon his own opinion, but on the opinion of an expert. Gene-



rally speaking, the duty of an executor is on the death of his testator at once to realize any mortgage securities forming part of the estate. If he departs from that usual course and retains the securities, he must fortify himself with the opinion of an expert, otherwise he is liable for any loss. He is not justified in keeping the matter outstanding for a number of years, as was the case here.

[LOPES L.J. Supposing the executor sold too soon?]

There is no case in which an executor has been held liable for selling too soon. It is the executor's duty to realize all the assets of his testator which are not in such a position as that they can be taken over by the trustees.

[RIGBY L.J. If you mean that there must be an immediate sacrifice, I shall require authority for the proposition.]

Executors or trustees have a discretion; and if they exercise it improperly, whether as to calling in or not calling in mortgage securities, or as to investing money on mortgage, they are answerable for any consequent loss: *Ames v. Parkinson*. (1) Here there was no real exercise of discretion in the way of taking an expert opinion at the testator's death: *Learoyd v. Whiteley* (2); *In re Brogden* (3); *In re Medland* (4); Lewin on Trusts, 9th ed. p. 355. The whole estate was jeopardized in consequence of Henry Chapman acting on his own determination not to call in the mortgages.

[LINDLEY L.J. This is one of the most important cases that we have had before us for years. What is an honest trustee to do in such a case?]

The predominant factor in this case is that at the time of the testator's death the whole of these securities were in jeopardy, and the evidence shews that the trustees were aware of it. It makes all the difference whether, at the time when the trustees came upon the scene, the securities which were the subject-matter of the trust were apparently good securities within the terms of the investment clause, or whether they were, to the knowledge of the trustees, in jeopardy. If a security is in jeopardy, the first thing that a prudent man

C. A.  
1896  
In re  
CHAPMAN.  
COCKS  
v.  
CHAPMAN.

(1) 7 Beav. 379.

(3) 38 Ch. D. 546.

(2) 33 Ch. D. 347, 350; 12 App. Cas. 727.

(4) 41 Ch. D. 476, 481.

C. A.  
1896  
In re  
CHAPMAN.  
COCKS  
v.  
CHAPMAN.

would do would be to give notice to pay it off; and Banham, the only expert witness, said in his evidence that, in his opinion, if the trustees had called in mortgage "A" they would have found no difficulty in obtaining the full amount; but they did not do so. So with regard to other mortgages, the trustees did nothing: they simply allowed matters to drift. Surely it is not enough for trustees merely to be hopeful. A trustee must act as a prudent man would do in the conduct of his own business; and no prudent man would have allowed his own matters to drift as the trustees have done in this case with regard to these trust securities.

*Warrington, Q.C.*, and *Gatey*, for the plaintiffs, the executors of Henry Chapman.

*Swinfen Eady, Q.C.*, in reply.

*Cur. adv. vult.*

Aug. 7. LINDLEY L.J. (after stating the facts). The evidence before us satisfies me that more trouble was taken to consider and determine what ought to be done than might be inferred from the affidavits alone. It is true that the trustees did not consult professional surveyors or valuers; but there was nothing special in the nature of the property, as there was in *Learoyd v. Whiteley* (1), to render the assistance of an expert really necessary for the guidance of a prudent man. A man need not be a professional surveyor or valuer to form a trustworthy opinion of the value of ordinary agricultural land, and the law is not so stringent as to compel us to say that the trustees were guilty of a dereliction of duty in not seeking advice from such persons. Mr. Henry Chapman, the acting trustee, was himself well acquainted with land and its value, and the testator thought well of him and trusted his judgment. He had no personal interest to serve in not doing the best for the trust estate. When he felt that he wanted further advice, he consulted the two Carters, a Mr. Robins, and Mr. Francis, all men of good judgment and experience. Mr. Francis is a solicitor in Norwich, and he told us what I entirely believe—that for some years after the testator's death Mr. Henry Chap-

(1) 33 Ch. D. 347; 12 App. Cas. 727.

man's opinion and the general opinion in Norfolk was that the fall in value of land would be temporary only, that its value would improve, and that it was unwise for mortgagees to attempt to realize their securities. These, however, are merely general observations, and it is necessary to examine more closely what the duties of the trustees were at various periods, and to ascertain whether and in what respects there was any failure to discharge those duties. The same persons being executors and trustees, it will be convenient to consider their duties, first, as executors, and, secondly, as trustees, as if the same persons did not fill both characters.

Under such a will as this, the duty of the executors was simply to call in the testator's unsecured debts, and to convert into money so much of his personal estate as was necessary to enable them to pay his funeral and testamentary expenses, and his debts and pecuniary legacies, and to hand over to the trustees whatever personal estate was not wanted for those purposes. No doubt, speaking generally, it is the duty of executors to get in debts due to their testator; but it was no part of the duty of the executors as such to realize mortgage securities of their testator not wanted for the above-mentioned purposes: see *Orr v. Newton* (1); and the executors were not, as executors, guilty of any devastavit in not realizing such securities.

The duties of the trustees have to be considered, first, with reference to their acceptance of these mortgages from the executors in the first instance; and, secondly, with reference to their retention of the mortgages up to the present time. As regards the acceptance of the mortgages from the executors in the first instance, or, in this case, the retention of the mortgages as part of the trust estate at the end, say, of a year from the death of the testator, it must be borne in mind that investments on mortgage were authorized by the will. The trustees had to consider, not whether they should invest money on a particular security, but whether they ought to get rid of a security of a kind which they were authorized to invest money upon. These two considerations are by no means practically

C. A.  
1896  
~  
*In re*  
CHAPMAN.  
COCKS  
v.  
CHAPMAN.  
Lindley L.J.

(1) 2 Cox, 274.

C. A.  
1896  
~  
*In re*  
CHAPMAN.  
COCKS  
v.  
CHAPMAN.  
Lindley L.J.

the same. Confining myself at present to the end of a year after the testator's death, what the trustees had then to consider was whether they ought to refuse to keep these mortgages as part of the trust estate. Most of the mortgages were for two-thirds of the prices paid for the lands; some were for less. But, as pointed out in *In re Medland* (1), the retention of a mortgage for more than two-thirds of the value of the property mortgaged is not necessarily a breach of trust. Having regard to the evidence in this case, I am not prepared to hold that there was any breach of trust in not realizing the securities by calling in the mortgage debts, or by proceeding to sell or foreclose in 1881 or 1882. In July, 1881, no one foresaw that the value of land would deteriorate more and more, as we now know that it has; and to have called in Heading's, Boldero's, Francis's, or even Aves's mortgages at that time would have been to do what no competent person would seriously have advised the trustees to do. No witness says that in July, 1881, or shortly afterwards, the testator's mortgage securities were so insecure that the trustees, acting with reasonable prudence, ought to have called them in. Mr. Banham, no doubt, says that, if called in shortly after the testator's death, there would have been no loss; but that is quite another matter. The chief clerk has found that these mortgages ought to have been got in or realized in July, 1881. I cannot adopt that view. The evidence is entirely the other way as to all the important mortgages. There may be some doubt about some of the smaller ones; but as regards those which are of any importance, it would, in my opinion, be wrong to hold that the trustees committed a breach of trust in retaining the testator's mortgages in the first instance as part of the trust estate.

But the mortgages are still unrealized; and it is now unfortunately true that, with one or two exceptions, they cannot be realized except at a great loss; and the real question is whether the trustees are liable for this loss. A mortgage security is unlike an ordinary investment, inasmuch as it consists of a debt which can be enforced by action, and also of a security which can be realized by sale or foreclosure. A trustee of

(1) 41 Ch. D. 476, 481.



mortgage security is, therefore, liable for loss sustained by his wilful default in not obtaining payment in either of these ways. But a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong.

We have to deal here with authorized investments, and this must never be lost sight of: everything turns upon it. Bearing this point in mind, and bearing also in mind that we have to deal with honest trustees placed in great difficulties by the constant fall in value in land, what is it that they have done wrong? First, it is said that they ought long ago to have called upon the mortgagors for payment. But so long as the land was a satisfactory security the trustees committed no breach of duty in not calling in the money; and when the land ceased to be a satisfactory security the mortgagors were themselves in such difficulties that nothing could be got from them. Moreover, the mortgagors for the large sums were farmers, and could not have paid off or materially reduced the mortgage debts and have kept on their farms. To have pressed them would have been to throw the farms on the hands of the trustees, and this certainly would not have been for the benefit of the trust estate. What could the trustees have done? They might have given up their securities and have proved for their debts; or they might have sold or valued their securities and proved for the difference; or they might have held aloof and retained their securities. The trustees adopted the last course, not hastily nor without consideration and advice, but after advice. Mr. Francis now says it was, in his opinion, the best course they could have taken. No one says the contrary, for Mr. Banham refers to a time when the mortgagors were still solvent. I cannot say that the trustees were guilty of such imprudence as to render them liable for the consequences of adopting the course they did.

Then it is said that the trustees ought to have realized the securities; but how? Foreclosure would have cost money, and would have benefited no one. The trustees have the mortgaged lands now, and nothing has been lost by not foreclosing. On the other hand, the expenses of foreclosing have been saved

C. A.  
1896  

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In re  
CHAPMAN.  
COCKS  
v.  
CHAPMAN.  

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Lindley L.J.

C. A.  
 1896  
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In re
 CHAPMAN.
 COCKS
v.
 CHAPMAN.
 Lindley L.J.

to the trust estate. The only other mode of realizing would have been by sale ; but not a single person is called to say that it would have been a prudent or judicious step to try and sell. On the other hand, there is evidence that it would not ; and it is clear that, unless the mortgaged property had been sold whilst the securities were good, sales, even if effected at all, would have resulted in serious loss. There is no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances falls upon and must be borne by the owners of the property—i.e., the cestuis que trust—and cannot be thrown by them on their trustees, who have done no wrong, though the result may prove that they possibly might have done better. *Learoyd v. Whiteley* (1) is a clear authority to this effect ; so are *Buxton v. Buxton* (2) and *Marsden v. Kent*. (3)

The case is an important one not only to the trustees of this particular will, but to trustees of mortgages generally. Owing to the great fall in the value of agricultural land trustees of mortgage securities have been placed in a position of great difficulty. To throw on the trustees the loss sustained by the fall in value of securities authorized by the trust, wilful default, which includes want of ordinary prudence on the part of the trustees, must be proved ; but it is not proved in this case. In my opinion, wilful default is disproved in all the important cases and is not proved in the doubtful ones.

The appeals must be allowed.

[His Lordship then directed that there should be one order on both summonses and both appeals, striking out from the certificate the finding that the mortgage securities had been improperly retained ; and varying the order of the Court below by striking out the declaration of liability and the consequential

(1) 33 Ch. D. 347 ; 12 App. Cas. 727.

(2) 1 My. & Cr. 80.

(3) 5 Ch. D. 598.

directions, and substituting a declaration that the trustees of James Chapman's will were not liable. No order as to the costs of the summonses and appeals.]

C. A.
1896
In re
CHAPMAN.
COCKS
v.
CHAPMAN.

LOPES L.J. In this case it is sought to throw upon trustees under the will of James Chapman—trustees who are also his executors—a loss in the value of certain mortgage securities occasioned by the depreciation in the value of land. The case is a most important one, and, having regard to the gradual and persistent depression of the agricultural industry in this country, most intimately concerns the position of a large body of persons who have incurred the responsibility of trustees.

The testator, James Chapman, died in July, 1880. The securities in question were authorized by the trust, and were all created during the life of the testator (a man who had largely invested in real securities and had acquired much experience as to their desirability), and were at the time of their creation respectively of sufficient value to justify the mortgage debts secured by them. The facts of the case, so far as necessary, have been fully stated. I propose to deal with the case only so far as concerns the liability of the trustees.

In 1879 the depression in the value of land, caused by the importation into this country of foreign produce, began first to be sensibly felt; a series of bad seasons followed, the season of 1879 being probably the worst of all. This depression, though it has fluctuated at times, has gradually continued. Expectation, however, of improved times has never, in the minds of those most competent to judge, become extinct. I unhesitatingly say that it would have been considered unwise until quite recently, when each succeeding year had rendered the future less hopeful, to have realized real securities such as mortgages, when that realization would of necessity have been attended with a heavy loss. It is very easy to be wise after the event; but in order to exercise a fair judgment with regard to conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time, and determine for ourselves what, having regard to the opinion prevalent at that

C. A.
 1896
In re
 CHAPMAN.
 COCKS
v.
 CHAPMAN.
 Lopes L.J.

time, would have been considered the prudent course for them to have adopted.

As I have said, the trustees and executors were the same persons, and it was faintly urged that they, as executors, ought to have realized these real securities at the end of a year after the testator's death. That is easily disposed of: it cannot be seriously contended that it was the duty of the executors to realize mortgages created by the testator himself, when their realization was not required for any testamentary purpose, and when the securities themselves were not in any peril.

I will now state what I believe to be the law applicable to trustees circumstanced like the trustees in the present case. A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection. The liability of trustees should not, in my judgment, be extended. What was said by Jessel M.R. in *In re Speight* (1) is very applicable to this case. He says (2): "I think it is the duty of the Court in these cases where there is a question of nicety as to construction or otherwise to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons to fix him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit. I think that is the view which has been taken by modern judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation. It appears to me that the Vice-Chancellor has adopted an entirely different view. I think he has inferred that which is not fairly to be inferred in this case; and even if he were right it could only be inferred by taking one of two views, and we ought not to take the adverse view if the other view, being equally as good, can be adopted." *In re*

(1) 22 Ch. D. 727.

(2) 22 Ch. D. 746.

Medland (1) and *Learoyd v. Whiteley* (2) are important cases on this subject.

Adopting my formula, have the trustees in this case sinned against it? In 1881 they take the mortgages from the executors and most certainly would not have been justified in realizing them—mortgages created by the testator, authorized by the trust, and at that time in no possible jeopardy. But they retained them. What was the state of things in 1881? No one could anticipate what was about to happen: it was not a question of value; it was a question of the prospects of the landed interest. Those prospects depended on an infinite variety of circumstances, the happening and effect of which no one but a prophet could foresee. The trustees admittedly were honest; admittedly they were competent. It is said they ought to have consulted valuers. I do not believe any valuer could have given any advice which would have assisted them. Valuers could have ascertained the then value of the land; but with regard to the prospects of land, or of its ultimate recovery, absolute or partial, they were powerless to express an opinion. I doubt much whether the opinion of a practical farmer, cultivating his own land, was not preferable to that of any ordinary expert. Henry Chapman was a practical farmer and well acquainted with land, and able, therefore, to form an opinion as to future prospects. Mr. Francis said, in answer to me in the witness-box, that the preponderance of opinion in the county was in favour of retaining mortgage securities rather than of realizing them, and no evidence was adduced to rebut that statement. But it is said the largest mortgagors were unable to pay the interest due on the mortgages, and that then the trustees ought to have adopted means to realize the debt. This, no doubt, is the strongest point made against the trustees, and involves considerations which require careful examination. The trustees might have brought an action on the covenants, they might have exercised the powers of sale contained in the mortgage deeds, or they might have foreclosed; and if any of these remedies could be shewn to have been imprudently neglected

(1) 41 Ch. D. 476.

(2) 12 App. Cas. 727.

C. A.
1896
In re
CHAPMAN.
COCKS
v.
CHAPMAN.
Lopes L.J.

C. A.
1896

In re
CHAPMAN.
COCKS
v.
CHAPMAN.

Lopes L.J.

by the trustees, and thereby loss to the estate caused, they would be liable for wilful default. But the answer is that it would not have been wise, as things then stood, to have pressed any of these remedies. So long as the land afforded a sufficient security it would clearly have been unwise to precipitate events which there was reasonable ground for believing never would have happened; and even in the case of the smaller mortgages it would be difficult to say that, having regard to the general opinion then prevalent, it was unwise to wait for better times, when it was clear that taking proceedings would in all probability have placed the land in the hands of the trustees for them to cultivate without any available capital, or would have eventuated in a sale at a ruinously low price.

When it was apprehended that the securities were insufficient, the trustees were placed in a most difficult position. I do not believe anything substantial would have been obtained from the mortgagors if actions had been brought on the covenants; and if those mortgagors who were farming the land, the subject-matter of the mortgages, had been pressed, the probability is that they would have been compelled to give up their farms, or, at any rate, for want of capital, to cultivate them in such a way as to make them unremunerative; and in this case the farms would have been thrown on the hands of the trustees, who would have had to find new tenants or to have cultivated the lands themselves, and have found capital for so doing.

The same answer may be made to the suggestion that the trustees ought to have foreclosed. Clearly this would not have been desirable, nor do I think giving up their securities and proving for their debt, or selling or valuing their securities and proving for the difference, would have benefited the trust estate. The only other course was to retain the mortgages, as they have done. I am unable to say this was unwise or amounts to a breach of trust, having regard to the very peculiar circumstances in which the trustees were placed; bearing in mind that the securities were authorized securities, and that nobody could with any degree of certainty anticipate the contingencies to which land was subject, or form any reliable opinion as to its future. There is evidence, and I believe it, to shew the

better-received opinion was that it was advisable to retain mortgage securities like these in hopes of better times. I cannot find that the trustees committed in these circumstances any breach of trust or made wilful default. I think the appeals should be allowed.

C. A.
1896
~
In re
CHAPMAN.
COCKS
v.
CHAPMAN.

RIGBY L.J. I agree that the appeals ought to be allowed, and I agree in the form of order that has been proposed by Lindley L.J. [His Lordship then, after expressing his regret that the course had been taken of having this question dealt with on originating summons by proceedings in chambers, continued :—]

With regard to the chief clerk's certificate, I am bound to say that, at the very first sight of it, I had a strong impression that it must be wrong, because we find all these numerous mortgages dealt with in one paragraph which treats it apparently as a matter of law that the securities ought to have been called in within twelve months after the testator's death, and fixes the responsibility of the trustees as from that date. Now, certainly, there is no such rule of law; and when we look at the schedule to the certificate, we find that these mortgages differ very greatly in their circumstances; and it seemed to me next to an impossibility that that finding in the chief clerk's certificate could in point of law be correct.

However, we could not proceed without having some further evidence before us; and the Court therefore decided, in the very special circumstances of the case, that by reason of the irregularity of the earlier proceedings, and notwithstanding the time that had taken place, justice required that liberty should be given to issue a summons to vary the certificate, the effect being of course to let in the evidence which had been read before the chief clerk; and leave was also given to cross-examine in Court Miss Chapman herself, and Mr. Francis, the solicitor, who had had a good deal to do with these matters.

I think that the misconception in this case has arisen altogether from confounding two totally different questions—the one, what is the duty of trustees who have money in their possession for investment; and the other, what is the duty of

C. A.
1896
In re
CHAPMAN.
COCKS
v.
CHAPMAN.
Rigby L.J.

trustees with respect to investments for which they are not primarily liable and which in the exercise of their discretion they have chosen not to call in. Those two questions are totally distinct. In the one case you have the money safe and capable of being invested in securities which would incur no risk at all—I mean no risk that the Court could anticipate—and no liability on the part of the trustees. And it is not unimportant to add that, as to any investigation into the value of the property, and as to any fees payable to experts, trustees can throw those expenses upon the intended mortgagor, instead of upon the estate. If, in these circumstances, trustees choose to disregard the well-known general rules of the Court, including the rule which is the most material for the present purpose, namely, that they are not to invest on mortgage of agricultural land to an amount more than two-thirds of its value, they are incurring a risk with their eyes open, and which is the consequence of their own acts alone. The case is, however, entirely different when you have to deal with securities already existing at the testator's death. As far as I know, the Court has never laid down that, even with regard to risky securities, such as Turkish bonds for instance, or to shares in an unlimited company, there is an absolute unvarying obligation on executors and trustees to call them in within the twelve months regardless of the opinion the executors or trustees may have as to the prudence or the advisability of doing so. Of the cases cited by Lindley L.J., I may mention those of *Buxton v. Buxton* (1) and *Marsden v. Kent* (2) as shewing that there is no such rule, and that the Court has never been so unreasonable as to say to a trustee, "There is a fixed and binding rule: you have not acted upon it: you have acted as you thought for the benefit of the estate, but what you have done has turned out unfortunately, and you must bear the loss." There is no such rule.

What is the duty of trustees who get possession of an estate comprising mortgage securities? Of course, if the securities appear *primâ facie* to be good mortgage securities, certainly there is no obligation on the trustees to call them in. It would be a very idle thing to do so for the purpose of investing in

(1) 1 My. & Cr. 80.

(2) 5 Ch. D. 598.

other securities, perhaps not more advantageous to the estate. At any rate, no such rule exists. What, then, have the trustees to do? They are to act honestly. In the present case there is no kind of doubt that the trustees acted honestly. One of them, Miss Chapman, was tenant for life of the property. Her interest, as well as that of the other persons who were residuary legatees, was to have the property safe. Trustees must act prudently with regard to their trust estate, as a prudent man acting prudently would do with regard to his own affairs.

Now let us consider the state of things as to these mortgages. The principal mortgages are those that have been called "A" and "B," Heading's mortgage, for altogether 10,000*l.*, and Boldero's mortgage for 5500*l.*; and, for other reasons, I shall have to consider Aves' mortgages, four in number. It is not necessary to consider the mortgages "C" and "J," because, as things now stand, there is no reason to suppose that any loss will be sustained, or any reason to doubt that, when those debts are called in, as they are to be called in under the order of the Court below, they will be paid in full. Practically, therefore, we are concerned only with the 10,000*l.* mortgage of Heading, the 5500*l.* mortgage of Boldero, and the mortgages of Aves. I do not think that any case was made out as to any other of the mortgages: they were thrown in as a makeweight; but certainly no such case has been made out by the evidence brought to our attention as would induce us, with respect to those, to make an adverse order on the trustees.

I will first deal with the "A" mortgage. It is shewn that, when the testator advanced the money, he did it within the two-thirds limit. There may be some question, possibly, whether that two-thirds limit was not slightly exceeded at the end of twelve months after his death; but under what circumstances had that deficiency, if any, arisen? Real property had been going up by leaps and bounds in this county of Norfolk, as indeed in other counties in England, for some uncertain period, of which Mr. Francis fixes the high water-mark as between 1871 and 1874. That advance in value had been going on for so long a period, as we all know, that it had come to be considered as part of the law of nature that real property must,

C. A.

1896

In re

CHAPMAN.

COCKS
v.

CHAPMAN.

Rigby L.J.

C. A.
1896
~~~~~  
*In re*  
CHAPMAN.  
COCKS  
*v.*  
CHAPMAN.  
~~~~~  
Rigby L.J.

in our state of society and civilisation, continue to advance; and then came what, upon the evidence, seems to have been taken as a period of temporary depression: 1879, the year before the testator's death, was one of the worst seasons that had yet been known; but—judging from the evidence, and I have no doubt that that evidence is in accordance with what we all know to be the fact—no one supposed that there was going to be further deterioration in the value of property. Every one in the country apparently thought that by waiting a little time the old order of things would return, and property would come back to its old value, and might be reasonably expected to go even far beyond it, according to experience at that time. At any rate, nothing was done. Taking the 10,000*l.* mortgage, the property was at that time on lease to a tenant at 550*l.* a year—a rent which in itself was a good deal more than sufficient to pay the interest on the mortgage. Did the trustees act otherwise than as a man acting prudently in his own affairs would have acted in taking no steps on that mortgage? I cannot say that they did. I think indeed that they acted as almost every prudent man would have acted at that time. It is suggested, and of course the point has to be considered, that they ought at the testator's death to have got a valuer to put a value on the property, and to have called on Mr. Heading to reduce the capital amount due on the mortgage to such a point that it would not then exceed two-thirds of the real value. I think that is a rule far too strict to impose for the first time on trustees, and I find no authority for saying that that is their duty. To value land is an expensive matter. The expense would have been a certain loss; if the trustees had determined to provide against a quite uncertain danger which prudent men at the time thought would be obviated by the recovery in the value of the land. That went on until 1885, and before 1885 Mr. Heading, the mortgagor, appears to have fallen somewhat in arrear, notwithstanding he was getting the rent of 550*l.* a year. He was pressed, as we know now, with his own affairs, and he fell into some arrear as to the interest. Who was Mr. Heading? He was a farmer, and the trustees had no reason to suppose he was otherwise than an honest man; and if he could

not keep down the interest, what was the chance of their succeeding in getting him to pay off any part of the capital? What would have been the probable result of pressing him? I think the probable if not the certain result would have been that his difficulties would have increased, he would have been obliged to become bankrupt, and the trustees would have incurred the risk of having to value their security under circumstances of very great difficulty. Of course, if they valued it too high, it would be left on their hands; if they valued it too low, it would not repay them the amount of their investment, and they would lose their security. I think there is a reasonable ground for supposing that any personal proceedings against Mr. Heading would have resulted in a loss, or at any rate would appear at the time (and that is the real point) as most likely to result in a loss rather than a benefit to the estate.

As I understand the authorities, they have never gone so far as to say that you must prove absolutely that proceedings taken under such circumstances would not have resulted in bringing back the money belonging to the estate; but you must shew that there was such reasonable ground for thinking they would not, that a prudent man, acting prudently, would have taken the course which was taken here by these trustees. As regards Heading's mortgage, I really do not think there is any ground whatever for saying that there was a breach of trust down to the time of Mr. Heading's difficulties in 1885; and from that time we know that the position of things had unfortunately changed so much to the disadvantage of the estate that the securities were altogether insufficient to pay off the debts. Mr. Francis says, speaking generally about these matters, that property was selling so badly that every one would have thought it absurd to offer it for sale. I do not see why we should not take that evidence as good evidence. Though Mr. Francis is not an expert in the value of land, he is a man thoroughly conversant with landed affairs in that part of the country from his position as a solicitor, and that evidence is evidence of great value in favour of the trustees.

I will not go through the other mortgages in the same detail. In Boldero's case there no doubt was a 5 per cent. security

C. A.

1896

In re

CHAPMAN.

COCKS

v.

CHAPMAN.

Rigby L.J.

C. A.
1896
In re
CHAPMAN.
COCKS
v.
CHAPMAN.
Rigby L.J.

instead of a 4 per cent. That points a little to the security not being of the full value, but rather more to the fact that the mortgagor was not in a position to go into the market and give the best security possible. He was in occupation of the mortgaged farm, and the trustees had to consider whether they would take the strong step of proceeding against him personally with the result that probably he would have had to give up the occupation of the farm; and we have to consider whether a prudent man, acting prudently, would have taken any such proceeding in his own case. I do not think he would. I think he would have said, "I had better let Boldero have the advantage of the good time which is likely to come; I had better allow him to remain there, and not turn him out of the estate with the strong probability that I shall get no other tenant, and that I shall be obliged either to sell, on disastrous terms, the property without a tenant, or to undertake the cultivation myself."

With regard to Aves' mortgages, I think the evidence shews that the matter was very carefully considered by Mr. Henry Chapman. Miss Chapman, no doubt, trusted a great deal to Mr. H. Chapman, and she might unfortunately have been made liable if he had done anything that was altogether wrong. But he seems to have gone into the matter very carefully indeed, and to have come to the conclusion, upon what, to my mind, were reasonable grounds, that it was far better not to run the risk of getting rid of them at such a valuation as could only be reasonably made then, but to hold on to them. I cannot see that in the case of any other mortgage there was anything done that was not done according to the lights and according to the knowledge of the time, or done in a way that was imprudent, unduly speculative, or in any other way reprehensible on the part of the trustees.

I will not refer to all the cases that have been cited because they have been already commented upon; but there is one case which has not been mentioned by my learned brethren, that of *Ames v. Parkinson*. (1) Upon that case, which was decided by a great authority, Lord Langdale, Mr. Warmington asked us to

(1) 7 Beav. 379.

come to the conclusion that there was a duty on trustees to call in mortgage debts corresponding to and in fact co-extensive with the duty which trustees are under when they invest money on mortgage. I do not read that case so at all. The question there was between a legatee of a legacy of 1500*l.* and the residuary legatees, one of whom was the very executor and trustee who was sought to be made liable. The question related to a small sum of 200*l.* for which the testator had held a mortgage, and which mortgage the executor had appropriated with other mortgages to answer the legacy of 1500*l.* The evidence was that the mortgage was not a sufficient security for the 200*l.*, and therefore, as between the pecuniary legatee and the residuary legatees, it was not a proper mortgage to retain. The trust there was to invest on mortgage securities or Government securities, one description of security being possibly somewhat risky, and the other perfectly safe. The executors and trustees carried out their trust by appropriation, and under the circumstances of the case what Lord Langdale said was that the executors were not bound to get in good securities in order to invest in others; but that the appropriation when made was made on the executors' own responsibility, and it was therefore incumbent on them to see that the securities appropriated were of sufficient value, and that the defendant, the surviving executor and trustee, must bear the loss. I do not think that that is at all a case like the present, where the investment has taken place without any responsibility on the part of the trustees, and where the only question is what, under difficult circumstances, the trustees ought to have done.

For these reasons I think the appeals should be allowed.

Solicitors: *Collyer-Bristow, Russell, Hill & Co., for J. O. Taylor & Sons, Norwich; H. A. Maude, for Francis & Back, Norwich; Waterhouse, Winterbotham & Co.*

G. I. F. C.

C. A.
1896
In re
CHAPMAN.
COCKS
v.
CHAPMAN.
Rigby L.J.

CHITTY J.

1896

April 16.
July 8.

In re LART.
WILKINSON *v.* BLADES.

[1894 L. 1555.]

Practice—Administration—Res Judicata—Person not a Party or bound by Judgment—Cognizance of former Proceedings—Accepting Benefit of Judgment—Estoppel by Conduct—Absent Parties—Class Representation—Rules of Supreme Court, 1883, Order XVI., rr. 11, 32.

A person not a party to an action or summons, nor technically bound by the judgment, but fully cognizant of the proceedings, who stands by and deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, is estopped by his conduct, where the circumstances are identical, from reopening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same will, though claiming in respect of a different interest.

An order appointing some one to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity.

ADJOURNED SUMMONS.

This was an application to determine the construction of the will of one John Lart, who died in 1853; but the only question argued was whether or not the applicant was already bound by a previous judgment of Chitty J., given in 1883, under which part of the fund settled by this will had been distributed.

The facts, so far as material, were as follows. The testator gave his property to trustees upon trust for investment and out of the proceeds to pay to his daughters Emma, Alice, and Ellen the several annual sums of 150*l.*; and to his daughters Mrs. Bezir, Marianne, Fanny, and Charlotte the several annual sums of 250*l.*; and declared that in case of the marriage of any of his said daughters he desired that a sum of money should be invested in the names of his trustees, the interest of which should amount to the said annual sums of 150*l.* and 250*l.* as the case might be, and that in case any of his said daughters died leaving a child or children, the principal should be divided equally share and share alike; and if only one, then all to that one child; and the testator declared that if any of his daughters

died not having been married, then in every case the principal should be divided among his surviving children, except in the case of his daughter Mrs. Bezir, who was given a power of disposition by will over the principal set apart to provide her annuity of 250*l*. The contingency of the death of a married daughter without having or leaving children was not expressly provided for; neither was there any gift of the testator's residuary estate.

The testator left his said seven daughters surviving him.

The testator's daughter Fanny died in 1869, and his daughter Charlotte in 1877, without having been married. The daughter Emma married D. Dewar and had children; the daughter Ellen married the plaintiff Wilkinson; and the daughter Marianne married W. R. Stanton, and died in 1881 without ever having had children.

On the death of Mrs. Stanton an action—*In re Lart, Blades v. Bezir* [1881 L. 3189]—was commenced for determining the question of construction on the will as to the destination of the share of the testator's estate set apart to provide for the annuity of 250*l*. given to Mrs. Stanton. In this action W. Blades, the trustee of the will, was plaintiff, and Mrs. Bezir's husband, Mr. Stanton, Alice Lart, and Mrs. J. Lart, the widow of the testator's eldest son, were defendants. Alice Lart was subsequently appointed to represent the testator's next of kin for the purpose of obtaining the judgment of the Court on the questions arising on the construction of the will or otherwise; and Mrs. J. Lart was similarly appointed to represent the estate of Mrs. Stanton. At the trial of the action the fund was claimed—first, by the testator's next of kin on the ground that there was an intestacy; secondly, by the defendant Bezir on behalf of his wife, as being divisible amongst the other surviving children of the testator, in the same manner as was provided by his will in the event of any of his daughters dying without having been married; and, thirdly, by Mrs. J. Lart, as representing Mrs. Stanton's legal personal representative, on the ground that Mrs. Stanton was entitled to the whole of the fund set apart to meet her annuity.

In March, 1883, Chitty J. decided that, according to the true

CHITTY J.

1896

In re
LART.WILKINSON
v.
BLADES.

CHITTY J. construction of the will and in the events which had happened, so much of a sum of 48,333*l.* 6*s.* 8*d.* Consols (the fund invested to answer the annuities) as was required to provide for the annuity of 250*l.* given to Mrs. Stanton was divisible equally among the children of the testator who survived her—namely, Mrs. Bezir, Alice Lart, Ellen Wilkinson (the plaintiff's wife), and Emma Dewar. The fund set apart to provide Mrs. Stanton's annuity was divided in accordance with this decision; and in October, 1883, a sum of 2000*l.* or thereabouts was paid by cheque by the trustees to Mr. and Mrs. Wilkinson on their joint receipt as her one-fourth share in this fund.

1896
In re
 LART.
 WILKINSON
v.
 BLADES.
 —

In January, 1894, Ellen Wilkinson died without ever having had children; and thereupon the present summons was taken out by the plaintiff, as the legal personal representative of his wife, against the trustees of the will, Mrs. Dewar and her children as defendants, for the determination of the question who, upon the true construction of the testator's will and in the events which had happened, became entitled on the death of Ellen Wilkinson to the capital of the fund set apart to answer her annuity. Mrs. J. Lart was subsequently appointed to represent the testator's next of kin.

There was evidence that the plaintiff, who acted in all business matters for his wife, was fully aware of the action of *Blades v. Bezir*, and of all the proceedings therein both before and after judgment; and a letter was produced from the plaintiff to Mrs. J. Lart, written in March, 1883, immediately after the decision of Chitty J., in which the plaintiff expressed his satisfaction at receiving 2000*l.* then, instead of a possibly larger sum at a future time, and deprecated an appeal, which some of the parties had suggested, or any further litigation.

Ingle Joyce, for the plaintiff. It is admitted that neither the plaintiff nor his deceased wife were parties to the former action, or served with notice, or otherwise technically bound by the proceedings. The representation order was only binding on Mrs. Wilkinson as one of the testator's next of kin, and did not bind her as one of the surviving children; the plaintiff, therefore, has a right to reopen the question of construction.

Probably the Court would follow its former decision, but then there could be an appeal. If necessary, the plaintiff is now willing to refund what he had received from the trustees under the former decision.

Byrne, Q.C., and W. A. Peck, for the defendants. The plaintiff was fully aware of all the proceedings in the former action, and with full knowledge of all the circumstances he deliberately took the benefit of the decision, and is estopped by his conduct from reopening the question of construction. The circumstances of this case are identical with those in *Blades v. Bezir*, and plaintiff is bound by the result of the decision in that case; had he been dissatisfied, he could have applied to be made a defendant, and could have appealed; but, as appears from his letter, he was satisfied; he has been content to see his battle fought by somebody else in the same interest, and he is bound by the result: *Young v. Holloway* (1); *Wytycherley v. Andrews*. (2) [*Duchess of Kingston's Case* (3), *Commissioners of Sewers of City of London v. Gellatly* (4), *Watson v. Cave* (5), and *May v. Newton* (6) were also referred to.]

CHITTY J.
1896
In re
LART.
WILKINSON
v.
BLADES.

Munns, for the trustees of the will.
Ingle Joyce, in reply. Even if the plaintiff had been a party he would not have been bound now, because the present application relates to a different fund, and the claim is made in respect of a different interest.

CHITTY J. The plaintiff in this action is the husband and legal personal representative of Mrs. Wilkinson, who recently died. The question raised is one of construction on the will of John Lart, who died many years ago. A question on the construction of this will came before the Court in March, 1883, when Mrs. Wilkinson was living, and upon that occasion a certain construction was put upon the will with reference to a trust fund in which Mrs. Stanton had the first life interest. Mrs. Stanton, as well as Mrs. Wilkinson, were daughters of the testator. Counsel for Mrs. Wilkinson has told me that the

(1) [1895] P. 87. (4) 3 Ch. D. 610.
(2) L. R. 2 P. & M. 327. (5) 17 Ch. D. 19.
(3) 2 Sm. L. C., 10th ed. p. 713. (6) 34 Ch. D. 347.

CHITTY J. will was a difficult one to construe—in fact, he termed it an unintelligible will ; but the Court, having to deal with wills of this class, did its best, and came to some conclusion as to the meaning of the testator. The decision turned on Mrs. Stanton's fund. The testator had provided several funds for his daughters, and the question which arose on Mrs. Stanton's death without issue was, What became of the capital of the fund of which she was tenant for life? There were many possible constructions ; the Court in the result adopted this—that that fund passed to the then surviving children of the testator. Mr. Wilkinson now says that that decision is erroneous. Counsel for Mr. Wilkinson declined to reargue before me the question which I then decided, and I think rightly, because the case was thoroughly discussed at the time.

1896
In re
LART.
WILKINSON
v.
BLADES.
—

Now, Mrs. Wilkinson was not a party to the action, nor was her husband ; but they were both aware of the suit and of its nature, and they were aware of the order when made, and Mr. Wilkinson, one of whose letters is before me, knew that some of the persons who claimed that there was an intestacy were disappointed with the decision, and that there was a question of appealing. Mr. Wilkinson acted for his wife, as he says in his affidavit, she leaving the matter entirely to him, and Mr. Wilkinson by the letter took a decided part in regard to the question of appeal, and dissuaded others who were parties to the action from appealing. He knew the nature of the case ; he knew that it had been represented, at any rate by a solicitor, that some of the counsel considered that an appeal would succeed, and yet he took the part against an appeal that I have already stated. Then comes, in these circumstances, the division of that particular fund, and Mr. and Mrs. Wilkinson received the sum of 2000*l.* or thereabouts of Mrs. Wilkinson's share, as one of the surviving children of the testator, in Mrs. Stanton's fund.

Consequently he was cognizant of the proceedings before judgment ; he was cognizant of the judgment itself, and with full knowledge of the circumstances he deliberately took the benefit of the order. Now, the question which he proposes to raise by the present summons is exactly similar. Mrs.

Wilkinson having died without issue, her fund becomes distributable just as Mrs. Stanton's did, and Mr. Ingle Joyce, who has argued the case with his usual ability, does not for one moment suggest that there is any distinction between the destination of the Stanton fund and the Wilkinson fund. Now, it appears to me that Mr. Wilkinson has deliberately taken the benefit of that judgment; on this summons he did not even offer to restore (and there was no separate use in his wife) what he received from the trustees under the decision—I say what he received: it was paid on their joint receipt, but, there being no separate use, that was a reduction into possession by Mr. Wilkinson himself. At the Bar, however, his counsel has very properly offered to refund; but, as far as I am concerned, that offer becomes immaterial, because Mr. Ingle Joyce admits that there is no question that I should have to follow (according to the usual practice of the Court) the decision I arrived at on a former occasion. And to this I add, that my attention has not been called to any part of the will, and that all I know about the will is just what I have stated.

Now, Mrs. Wilkinson and her husband, not having been parties to that action, were not bound, as a person who is a party is bound, by the result of the action. There was apparently some oversight on the part of counsel for the plaintiff, in not making Mrs. Wilkinson a party, and there was no representation order that covered her case. It was suggested before me on the present occasion that she was one of the next of kin, and that there was an order appointing a party to the action to represent the next of kin; but I have expressed my opinion during the argument, to which I adhere in this judgment, that an order appointing a person to represent a class, such as the next of kin, does not affect one of the next of kin who has a distinct and independent right, as Mrs. Wilkinson had, as one of the surviving children of the testator. I have been asked by Mr. Wilkinson's counsel what Mr. and Mrs. Wilkinson could have done in the circumstances. Could they have rejected the money? They certainly could have declined to take it; but Mr. Wilkinson was pleased to take it knowing of

CHITTY J.

1896

In re
LART.

WILKINSON
v.
BLADES.

CHITTY J. this possible case which has existed, and preferring to get the 2000*l.* down rather than wait for the event which has happened of his wife dying without issue, in which case his claim would be, as it now is, for a considerably larger sum. Mr. Wilkinson—I will speak of the husband alone to avoid useless repetition—could, the day after that judgment, if he had been dissatisfied with it, have brought his own action, seeing that he was not a party, and asked the Court to put a different construction on the will; and, assuming that the same judge or another judge would have followed the first decision as a precedent, Mr. Wilkinson could then have brought his appeal practically against the first decision. That is one course he could have adopted. Another is this: that pending the proceedings, had he thought fit, he could have applied to the Court under Order XVI., r. 11, which was then in force, and asked that he should be added as defendant, and had he done so he would have been made a defendant; so that there were two courses which he could have adopted for the purpose of bringing the case before the Court of Appeal within a reasonable time after the first decision.

Now, it is plain that Mr. Wilkinson has done this: he has, in the language of Lord Penzance in *Wytcherley v. Andrews* (1), “knowing what was passing,” been “content to stand by and see his battle fought by somebody else in the same interest”; because the point that Mr. Wilkinson now desires to raise was raised on the occasion of the former decision. In the Probate Division, as is shewn by *Young v. Holloway* (2) and other earlier authorities, a party, where a will is in question, has a right to intervene, and if he does not intervene, he is *prima facie* bound by the result of the litigation; and the reasoning upon which that practice has been established is that which is disclosed by the passage from which I cited an extract. He has power to intervene; he remains a spectator and he lets others fight his battles. In that case the Probate Court holds that he is bound, and Lord Penzance in *Wytcherley v. Andrews* (3) referred to the practice in the Chancery Division

(1) L. R. 2 P. & M. 329.

(2) [1895] P. 87.

(3) L. R. 2 P. & M. 327.

of representative actions in support, if support were wanted, of the practice in the Probate Court. The point, however, that I make on this occasion is, not that there was any representation order binding Mr. Wilkinson; on the contrary, I think there was not; and when Lord Penzance made the reference to the practice in this Division the rule to which I have referred, which was introduced in 1875, was not in existence. Lord Penzance's decision in *Wytcherley v. Andrews* (1) was in 1871; but the analogy between the practice in that Court and the practice in this is now the stronger, because any one who is interested in an action can now come forward and ask to be made a party. As I have already stated, if Mr. Wilkinson had come forward there can be no question that the Court would have acceded to his request and made him a defendant.

I refer—though not for the purpose of founding any decision on it—to a case which is somewhat analogous at common law. Of course parties to a judgment are bound, but persons claiming under them are also bound; and that is founded on the principle that “Qui sentit commodum sentire debet et onus.” Mr. Wilkinson has taken advantage of the former trial; and though Mr. Ingle Joyce is quite right, that this is not the same fund, and that according to the strictness of common law principles in reference to judgments the analogy would not be perfect, yet it appears to me that dealing with this, which is an equitable law, that analogy does afford some reasonable ground for saying that Mr. Wilkinson in the circumstances is bound. Now, I have not said he is bound by the judgment—I think he was not; but by his conduct after the judgment and under the judgment: knowing all the circumstances and deliberately taking the benefit of it, knowing that in a certain event that judgment might prove adverse to his material interests, he stood by, and by taking the money has acquiesced if ever a man could acquiesce.

In his reply, Mr. Ingle Joyce took up a still higher position, and said that supposing he had been a party, Mr. Wilkinson would not have been bound, because the decision was not on the same fund as that which is now in question, and I listened

CHITTY J.

1896

In re
LART.

WILKINSON

v.

BLADES.

(1) L. R. 2 P. & M. 327.

CHITTY J. with admiration to an argument with regard to precedent. A large portion of our law is founded on precedent. Judges at the present time find themselves bound (sometimes they somewhat object to find themselves bound) by a series of decisions. I agree that there is a liberty which a judge has at the present time, and I would even on the present occasion have listened to an argument from Mr. Ingle Joyce or any other counsel, if it could be shewn that there was something in the circumstances on which that former decision was obtained which would make it just and equitable that it should be now revised ; and though I have heard some very eloquent remarks from Mr. Ingle Joyce on that topic, nothing was in fact pointed out to justify that introduction of it. These Courts are bound by precedent. I am told that is a figure of speech : I think it is not a figure of speech. At the same time, the extent to which the Court is bound by precedent is always an open question, and one which the Court will willingly consider, and which it is the duty of the Court to consider.

The result is that though Mr. Wilkinson is not technically bound by the judgment, yet, having regard to his conduct, his knowledge, and the circumstances of the case, I think it is contrary to good faith and to equity that he should raise this question at the present time.

I therefore dismiss this summons, not merely on the ground of the former decision as a precedent, but on the ground that personally the applicant is not entitled to maintain it.

Solicitors: *G. F. Hudson, Matthews & Co.; Dawes & Sons, for Young, Son & Coles, Hastings; Munns & Longden.*

W. C. D.

In re HORN & FRANCIS.

CHITTY J.

Solicitor—Costs—Taxation—Scale Fee—Lease in consideration of Rent and Premium—Fee for Negotiating—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), Sched. I., Part II., rule 5.

1896
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 Oct. 29.

Where a lease is granted in consideration of a fine or premium as well as of a rent, the lessor's solicitor is not entitled to charge a further fee for negotiating in addition to the scale fee in respect of rent chargeable under Part II. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, and the deducing fee chargeable on the premium under rule 5 of the rules to Part II., Sched. I. The negotiation fee is included in the scale fee chargeable in respect of rent.

*In re Field* (29 Ch. D. 608) and *In re Robson* (45 Ch. D. 71) discussed and followed.

SUMMONS by a firm of solicitors to review a taxation.

Messrs. Horn & Francis acted as solicitors for the lessor in respect of a lease of certain property to the lessee, the respondent to the summons, who had agreed to pay all costs for which the lessor was liable. The lease was granted in consideration of a fine or premium of 5000*l.* and of an annual rental of 250*l.* The solicitors delivered to the lessee their bill of costs, which included, in addition to the scale fee chargeable under Sched. I., Part II., of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, in respect of rent amounting to 29*l.*, and the deducing fee chargeable on the fine amounting to 45*l.* (which was charged by virtue of rule 5 of the rules to Part II. to Sched. I.), a further fee of 40*l.* in respect of negotiating the lease, which it was admitted they had done, no commission having been paid by them in respect of such negotiation.

The bill, on the application of the lessee, was referred for taxation, and the taxing master disallowed the fee of 40*l.* for negotiating the lease, being of opinion that he was bound by the decisions in *In re Emanuel and Simmonds* (1), *Savery v. Enfield Local Board* (2), and *In re Robson* (3), though the exact point before him had never been decided.

(1) 33 Ch. D. 40.

(2) [1893] A. C. 218.

(3) 45 Ch. D. 71.

CHITTY J. *C. E. E. Jenkins*, in support of the summons. Although, in the case of a lease granted in consideration of a rent only, the scale fee on the rent provided by Part II. of Sched. I. covers all negotiations, yet where a lease is in consideration of a premium as well, "the further sum equal to the remuneration on a purchase at a price equal to such premium" provided by rule 5 authorizes the allowance of a scale fee for negotiation as well as a scale fee for deducing title.

By that rule a distinction is made between leases granted in consideration of a rental only and leases granted in consideration partly of a premium and partly of a rental.

Lindley L.J., in his judgment in *In re Field* (1), says: "Then again, if we look at the 5th of the 'rules applicable to Part II. of Sched. I.,' we find that if a lease is granted for a premium the purchase scale applies to the premium. In such a case there can be no doubt that negotiations are included." In the report of the same case in the *Law Journal* (2) the latter part of his judgment runs thus: "The charges applicable to a purchase apply, which of course include a specific charge for negotiations." The remarks of North J. in *In re Robson* (3), that "no charge can be allowed for negotiations in business coming within Part II. of Sched. I.," apply only to ordinary leases, and were not intended to apply to the leases referred to in rule 5, granted partly in consideration of a premium and partly of a rent. I submit that the bill ought to be referred back to the taxing master.

*O. L. Clare*, for the lessee. *In re Field* (1) decided that the scale fee on the rent covered the negotiations; and North J. in *In re Robson* (3) took the same view, though this point was not before him. If the Court holds that the solicitor is entitled to the fee for negotiation which the taxing master has disallowed, the solicitor would be paid twice over for the same thing. [He referred to *Savery v. Enfield Local Board* (4) and *In re Emanuel and Simmonds*. (5)]

*Jenkins*, in reply.

(1) 29 Ch. D. 608.

(3) 45 Ch. D. 71, 76.

(2) 54 L. J. (Ch.) 661, 664.

(4) [1893] A. C. 218.

(5) 33 Ch. D. 47.



CHITTY J. The question is whether the lessor's solicitor is entitled to the scale fee prescribed for negotiating a sale where the lease is at a rent and in consideration of a premium. The taxing master has allowed the scale fee calculated on the rent, and he has also made an allowance in respect of the premium ; but he has confined the allowance in respect of the premium to the scale fee allowed in the case of a sale for deducing title, and he has declined to allow the solicitor the fee for negotiation.

CHITTY J.

1896

~~~~~  
In re
HORN &
FRANCIS.

The taxing master's certificate, so far as it has allowed to the solicitor the fee for deducing title, is in accordance with North J.'s decision in *In re Robson* (1), and there is no question in regard to that allowance ; but the solicitor is dissatisfied, and asks for the further allowance that I have mentioned.

Now, it is plain that the solicitor, where the lease is such as the present lease is, is entitled to something more than the scale fee calculated on the rent. Rule 5 of Part II. of Sched. I. prescribes that there shall be paid to the solicitor, in such a case, a further sum equal to the remuneration on a purchase (which is distinctly a slip for "on a sale") at a price equal to such money payment or premium.

The language is not happy : it is referential, and the question is what it refers to.

North J., in the case of *In re Robson* (1), carefully considered the rule where the lease was partly at a premium, and ascertained, according to his judgment, to what portion of Part I. of Sched. I. reference was made. He says : "Remuneration on sales is given by Part I. of Sched. I. to the vendor's solicitors for three things : (1.) negotiating a sale by private contract ; (2.) conducting a sale by public auction ; and (3.) deducing title to property and perusing and completing conveyance. The first of these cannot be intended."

Now, this was part of the ground of the learned judge's decision. No doubt he was not there asked to decide the point whether the solicitor could claim the negotiation fee. In that case the taxing master had not allowed the solicitor anything under the latter part of rule 5, to which I have referred.

(1) 45 Ch. D. 71, 76.

CHITTY J. North J. considered that the solicitor was entitled to something—and I think it is clear, on the rules, that he was entitled to something more than the scale fee calculated on the rental—and he held that the reference was made to deducing title because he allowed him that remuneration, although in that particular case the solicitor appears not to have deduced the title at all. He allowed it on the ground that he was bound to allow something more by virtue of the express words of the 5th rule; but he made it plain, as part of the ground of his decision, that the solicitor was not entitled to any fee for negotiation.

1896
 ~~~~~  
*In re*  
 HORN &  
 FRANCIS.  
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In his decision North J. referred to the case of *In re Field* (1), which decided that in the ordinary case of a lease at a rent (and there there was no question of premium) the allowance prescribed in the way of percentage included the solicitor's trouble for negotiating. There is no express remuneration by way of percentage given to the solicitor, but the percentage remuneration given to the solicitor in that case includes payment for his trouble for negotiating.

Now, in the case before me the solicitor has got, by reason of the allowance calculated on the rent, payment for the negotiation. That, I think, is quite plain, having regard to the decision in *In re Field* (1), which has been approved by the House of Lords in *Savery v. Enfield Local Board*. (2)

In my opinion the solicitor here is asking to be paid twice over in respect of the negotiation. The 5th rule, as is obvious, might have been framed in a different way. It might have been framed in this manner, that where there is a lease at a rent, and also in consideration of a money payment or premium, the transaction shall be divided into two parts; and in regard to the rent the rent scale shall apply, and in regard to the premium the sale scale shall apply.

But that is not the form nor, in my opinion, the substance of the rule; there is no division into two parts. The rule merely provides that a further sum shall be added to the remuneration which the solicitor obtains according to the scale in respect of it. Then, as I said before, arises the question what that further sum is to be; and it is not, I admit, easy to

(1) 29 Ch. D. 608.

(2) [1893] A. C. 218.

find out exactly to what part of the scale reference is made. I think North J. was right in what he said, although he had not the question before him of allowing or disallowing the negotiation fee. The solicitor in that case was not bold enough to claim it; and it appears to me that I should be allowing the solicitor to be doubly paid for negotiating if I acceded to the solicitor's request in the present case. The scale fee, calculated on the rent, does not attribute any portion of the amount of remuneration that the solicitor gets on that footing to the negotiation. It is impossible to say how much mathematically was allowed to the solicitor on that head, but he is paid for it, and I think it would be inconsistent to give him the fee prescribed on a sale at percentage in reference to the premium for the negotiation of the sale.

For these reasons the application fails.

Solicitors: *Horn & Francis; Walfords.*

G. M

CHITTY J.

1896

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In re

HORN &
FRANCIS.

—

NORTH J.

1896

July 28, 29,

In re GRAY'S SETTLEMENT.
AKERS *v.* SEARS.

[1896 G. 812.]

Settlement—Construction—“Next of Kin in blood”—“Intestate.”

In a gift to next of kin a reference to the death of the propositus intestate imports division among blood relations according to the Statute of Distributions.

Consols were settled on trust after the death of M. A. Gray for “the next of kin in blood to the said M. A. Gray . . . in case she had so died intestate and unmarried” :—

Held, that children of deceased brothers and sisters of M. A. Gray were entitled as well as living brothers and sisters to share in the fund.

By a settlement dated September, 1873, made in contemplation of the marriage, which shortly afterwards was solemnised, between William Myers and Mary Ann Gray, it was declared that after the death of Mary Ann Gray, and if she should not make any will, certain furniture and effects comprised in the settlement, over which she was given power of appointment by will, should “go and belong to the next of kin in blood of the said Mary Ann Gray at her decease in the manner directed by the statutes for distribution of intestates’ effects as if she had died intestate and unmarried.” And it was declared that a sum of 665*l.* 16*s.* New 3 per cent. Annuities comprised in the settlement should, after the death of the survivor of William Myers and Mary Ann Gray, in case there should be no child of the intended marriage who should obtain a vested interest, be held upon trust “for the person and persons who shall be next of kin in blood to the said Mary Ann Gray at the time of her decease in case she had so died intestate and unmarried.”

There were no children born of the marriage. William Myers died in 1880. Mary Ann Myers (formerly Mary Ann Gray) died on March 16, 1896, having made a will bequeathing the furniture comprised in the settlement. At the time of her death she had one brother of the whole-blood living and several

living nephews and nieces, children of her deceased brothers and sisters of the whole-blood; brothers and sisters of the half-blood living and living nephews and nieces, children of a deceased sister of the half-blood.

This was an originating summons to determine who were entitled to the fund representing the settled annuities. The plaintiff was a son of a deceased sister of the whole-blood of Mary Ann Myers, one of the two trustees of the settlement. The defendants were William Joseph Sears, the other trustee of the settlement; James Gray, a brother of the whole-blood; and Harry Morgan, a brother of the half-blood of Mary Ann Myers.

NORTH J.
1896
In re
GRAY'S
SETTLEMENT.
AKERS
c.
SEARS.
—

Henry Terrell, for the plaintiff. Where there is a trust for or gift to "next of kin" or "next of kin in blood" of a person, the nearest relations in degree of consanguinity take; so that if there are brothers and sisters alive they take to the exclusion of children of deceased brothers and sisters; if, however, there is an express reference to the Statute of Distributions or a reference to the intestacy of the propositus, which is considered to imply a reference to the statute, the rule is that the blood relations take who would have taken had the property in question been the property of the propositus, and she had died intestate to the exclusion of the husband or wife of the propositus: *Garrick v. Lord Camden* (1); *Withy v. Mangles* (2); *Smith v. Campbell*. (3) I admit that the phrase "had she died unmarried" has no effect: *Halton v. Foster* (4); nephews and nieces are therefore entitled to participate in the fund.

Badcock, for the first two defendants. It is admitted that "next of kin" by itself means the nearest relations in degree of consanguinity. The addition of the words "in blood" to that phrase shews a positive intention to exclude a distribution under the statute. The question, then, is whether the superadded words, "in case she had so died intestate and unmarried," import such reference to the statute as to let nephews and nieces of deceased brothers and sisters in.

(1) 14 Ves. 372.

(2) 10 Cl. & F. 215.

(3) 19 Ves. 400.

(4) L. R. 3 Ch. 505.

NORTH J.
 1896
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*In re*  
 GRAY'S  
 SETTLEMENT.  
 AKERS  
*v.*  
 SEARS.  
 —

There is no express reference to the statute. I submit that the words "in case she had died intestate" are not a sufficient reference to it. In *Garrick v. Lord Camden* (1) there were similar words; but the point was really not decided: there was no conflict between brothers and sisters on the one side and children of deceased brothers and sisters of the testator on the other side. From the report of that case it does not appear that both classes of relations existed; the decision was that the widow did not take.

In this particular case the phrase is, "in case she had so died intestate and unmarried." The word "so" is devoid of meaning, and the phrase "in case she had died unmarried" is also devoid of meaning. The whole sentence must be rejected as superfluous and unmeaning.

The words in this case are different from those in *Garrick v. Lord Camden*. (1) There, there was a direction to divide the property in question. The words in this settlement import a joint tenancy, which requires an equality of the shares: this shews an intention to exclude distribution under the statute, according to which the shares would be unequal.

*Ingpen*, for Harry Morgan. It is settled that half-blood relations come in equally with whole-blood relations.

NORTH J. I will not trouble you, Mr. Terrell. I think the point is clear. I do not quite know what is meant by the word "so": if it means without children, the word does not carry us further, and I have heard no other satisfactory explanation of its meaning. We have to construe the phrase "next of kin in blood to the said Mary Ann Gray at the time of her decease in case she had so died intestate and unmarried."

In the first place, according to the case of *Withy v. Mangles* (2) and other authorities, the words "next of kin," taken by themselves, do not mean next of kin according to the statute, but the nearest blood relation to the propositus; so that, under a gift to next of kin simply, brothers and sisters would take to the exclusion of children of deceased brothers and sisters. The question, therefore, is whether in the subsequent

(1) 14 Ves. 372, 385.

(2) 10 Cl. & F. 215.

words there is a reference to the statute, either express or implied, so as to bring children of deceased brothers and sisters within the terms of the trust.

I take the case of *Garrick v. Lord Camden* (1), which seems to me nearer the present than any other case. The words in that case were, "To be divided amongst my next of kin as if I had died intestate." The phrase here is, "next of kin in blood to the said Mary Ann Gray at the time of her decease in case she had so died intestate and unmarried." To begin with, I do not see any difference between the phrases "as if I had died intestate" and "in case she had died intestate"; and the use of the words in the previous trust of the furniture, where the statute is expressly referred to, confirms my view that the same persons are meant. But independently of the previous clause in the settlement, I come to the conclusion that there is intended to be a reference to the statute.

In *Withy v. Mangles* (2), Lord Cottenham in his judgment puts this case (3): "A testator may indeed so express himself, as to intimate an intention that the rule of the statute should prevail; as in *Stamp v. Cooke*. (4)" Then he refers to *Lowndes v. Stone* (5), and says: "And in *Garrick v. Lord Camden* (6), Lord Eldon intimated an opinion that the same construction would be put upon a gift of residue 'to be divided among my next of kin, as if I had died intestate,' which could only be effected by adopting the rule of the statute." Therefore, if the words "to be divided among" are not important, that case is exactly like the present.

Another case, *Smith v. Campbell* (7), was cited. The Master of the Rolls there said: "Even if the words were 'next of kin,' yet if there was nothing to shew that he had reference to the Statute of Distributions, or to a division as in case of intestacy, the inclination of my opinion would be, that the nearest in kindred only are entitled; and that brothers and sisters would exclude nephews and nieces from participating in such a

NORTH J.  
1896  
In re  
GRAY'S  
SETTLEMENT.  
AKERS  
v.  
SEARS.  
—

(1) 14 Ves. 372.

(2) 10 Cl. & F. 215.

(3) Ibid. 253.

(4) 1 Cox, 234.

(5) 4 Ves. 648.

(6) 14 Ves. 385.

(7) 19 Ves. 400, 404.

NORTH J. bequest." So that he treats the two things as the same—a reference to the statute; that is, an express reference; or a reference to division in case of intestacy, which he evidently thinks equivalent to a reference to the statute.

1896  
 In re  
 GRAY'S  
 SETTLEMENT.  
 AKERS  
 r.  
 SEARS.  
 —.

The words in this settlement are "in case she had died intestate and unmarried"; and, according to the case of *Halton v. Foster* (1), the words "in case she had died unmarried" would not have been sufficient to import a reference to the statute. It is said that because this part of the clause is unmeaning and ineffectual, the whole clause is to be rejected. I do not think so. I think the words "as if she had died intestate," though in conjunction with meaningless words, import a sufficient reference to the statute. It is said that the words "next of kin in blood" are different from the words "next of kin." I do not see how I can draw any distinction between the two phrases. In *Halton v. Foster* (1), where the former phrase occurs, Lord Hatherley says in his judgment (2): "The authorities, which up to a certain point are distinctly applicable to this case, have settled that the words 'next of kin,' without more, mean the nearest blood relations of the propositus. The words here, 'next of kin in blood,' are not less strong. I do not say stronger, for the words 'in blood' appear only to indicate an intention to exclude affinity in favour of consanguinity." I take it, therefore, that the words "next of kin in blood," as matter of construction, have the same meaning as "next of kin," and the addition of the words "in blood" does not exclude the statute. But in the present settlement I think it all the more clear, because in the ultimate trust of the furniture, where the distribution is clearly intended to be according to the statute and between blood relations, the same phrase is used.

Then it is said that in the case of *Garrick v. Lord Camden* (3) there was a direction to divide, and that distinguishes this case. It is clear that division was not treated in any of the cases as essential. I do not think there is any difference between a direction to divide property among persons and a direction to pay to them, or to hold it in trust for them: in each case it

(1) L. R. 3 Ch. 505.

(2) L. R. 3 Ch. 506.

(3) 14 Ves. 385.



would be the duty of the trustees, when the property became free for distribution, to hand it over to the persons indicated. Then it is suggested that the trust here is in a form that imports joint tenancy, and that persons who take according to the statute must take as tenants in common: and as a general rule that is so. But supposing a donor used the expression in a gift to statutory next of kin, "to take under the statute as joint tenants," what would be the effect of the words "as joint tenants"? They must have a meaning, if it can be given to them. If the persons to take were in a position to take equally, I do not see why the express words of the donor should not have a meaning. On the other hand, if the members of the class could not take equally, they could not be joint tenants, and the words would be inoperative.

I am of opinion that the phrase used was intended to have and has the effect of referring to the statute, and the children of deceased brothers and sisters of Mary Ann Gray, as well as her brothers and sisters who survived her, are entitled to participate in the fund.

Solicitor for plaintiff: *George Terrell*.

Solicitors for first two defendants: *Crowders & Vizard*.

Solicitors for third defendant: *Hancock & Marrable*.

D. P.

NORTH J.

1896

*In re*  
GRAY'S  
SETTLEMENT.

AKERS

*v.*  
SEARS.

NORTH J.

1896

Nov. 3, 4.

PROUT v. COCK

[1895 P. 1138.]

*Mortgage—Redemption—Remainderman—Consent of Tenant for Life or for limited Estate.*

A testator, having mortgaged land in fee, devised it (as the Court construed his will) to his wife during the minority of his two sons, and directed that when they were of age the property should be equally divided between his wife and children, whichever of them might be living at that time. After the testator's death the widow mortgaged her interest under the will to the original mortgagee, and died while the sons were still infants. The infants, by a next friend, brought an action against the mortgagee to redeem the testator's mortgage:—

*Held*, on the authority of *Ravald v. Russell* (Younge, 9), that, during the continuance of the widow's limited estate, the plaintiffs were not entitled to redeem the testator's mortgage without the consent of the mortgagee as owner of the limited estate.

ACTION for the redemption of a mortgage.

By a deed dated July 6, 1878, Abraham Prout mortgaged four houses and some land at Peramporth, Cornwall, to Francis Hearle Cock in fee, to secure the repayment of 550*l.*, with interest thereon.

By his will, dated May 28, 1882, Abraham Prout desired that the mortgaged property “be made over to my wife Elizabeth Prout and my two children Abraham and Samuel John Prout respectively . . . I desire that during my children's minority my wife should receive all the income that may accrue from the property and that when they are of age the property should be equally divided between my wife and children, whichever of them may be living at that time.” And the testator appointed his wife sole executrix of his will.

The testator died on May 30, 1882.

By a deed dated May 1, 1889, Elizabeth Prout conveyed to Francis Hearle Cock “all that the part or share of her the said Elizabeth Prout under or by virtue of the will of Abraham Prout of and in the said hereditaments” (subject to the mortgage of July 6, 1878) by way of mortgage to secure the repayment of 250*l.*, with interest thereon.

In December, 1893, Cock entered into receipt of the rents of part of the mortgaged property under the mortgage by Elizabeth Prout. NORTH J.

On February 28, 1895, Elizabeth Prout died intestate.

On May 27, 1895, this action was commenced by the testator's sons Abraham and Samuel John Prout, who were infants, by a next friend, against F. H. Cock, claiming redemption of the mortgage of July 6, 1878. The plaintiff Abraham Prout was the heir-at-law of both his father and his mother. When the action came on for trial North J. held that under the testator's will his wife took a beneficial interest which, notwithstanding her death, continued during the minority of the children, and that in the absence of her personal representative the action was not properly constituted. The trial was ordered to stand over with liberty to amend. Administration to Elizabeth Prout was then taken out, and Henry Betson, the administrator, was added as a defendant.

By the amended statement of claim the plaintiffs claimed redemption of the mortgage of July 6, 1878, or, in the alternative, redemption of the two mortgages.

Nov. 3. *L. Ryland*, for the plaintiffs and for the defendant Betson.

*Dauney*, for the mortgagee. The tenant for life of a settled equity of redemption has the first right to redeem the mortgage, and during his life the remainderman is not entitled to redeem without his consent: *Fisher on Mortgage*, 4th ed. p. 708; *Ravald v. Russell* (1); *Raffety v. King* (2); *Riley v. Croydon*. (3)

[NORTH J. referred to *Hyde v. Dallaway*. (4) ]

The same principle applies to any limited estate, such as the estate given in this case to the testator's widow during the minority of the plaintiffs; and, as the mortgagee has acquired that estate by way of mortgage, the plaintiffs are not entitled, so long as that estate lasts, to redeem the mortgage of the fee without the consent of the mortgagee.

[The point was also raised, whether under any circumstances

(1) *Younge*, 9.

(3) 2 Dr. & Sm. 293.

(2) 1 *Keen*, 601.

(4) 2 *Hare*, 528.

NORTH J. an infant can redeem a mortgage; but as the decision did not turn on this point this portion of the argument is omitted.]

1896

PROUT

v.  
COCK.

*L. Ryland*, in reply. The plaintiffs only want to redeem the mortgage created by the testator. The two mortgages do not affect the same property; the mortgage created by the widow affects only her interest, not the whole estate. The plaintiffs have an interest in the fee. *Ravald v. Russell* (1) differed from the present case: there the two mortgages were created by the same persons.

NORTH J. In my opinion, *Ravald v. Russell* (1) applies. I can see no distinction between a life estate and any other limited interest. Unless, therefore, Mr. Ryland can cite some authority to the contrary, I must hold that the plaintiffs are not entitled, during the minority of either of them, to redeem the testator's mortgage without the consent of the mortgagee as owner of the widow's limited interest.

Nov. 4. *Ryland* stated that he had been unable to find any decision opposed to *Ravald v. Russell*. (1)

NORTH J. Then I must dismiss the action. The mortgagee will add his costs to his security.

Solicitors: *G. K. Wright, for E. L. Carlyon, Truro; Street, Poynder & Whatley, for Hearle Cock & Parkin, Truro.*

(1) *Younge*, 9.

W. L. C.



*In re* HERBAGE RENTS, GREENWICH.  
CHARITY COMMISSIONERS *v.* GREEN.

STIRLING J.

1896

April 15, 16;  
Aug. 5.

[1893 H. 3667.]

*Rent-charge—Tenant for Years—Personal Liability—Charitable Trusts*  
(*Recovery*) Act, 1891 (54 & 55 Vict. c. 17), s. 3.

A tenant for years is not liable in an action of debt for non-payment of a rent-charge issuing out of the land of which he is in occupation, nor in the case of a rent-charge created for charitable purposes is he liable in an action in the Chancery Division at the instance of the Attorney-General or the Charity Commissioners.

THIS was an originating summons taken out by the Charity Commissioners for England and Wales under the Charitable Trusts (Recovery) Act, 1891, against the Rev. Walford Green, asking that it might be declared that the freehold messuage called Macartney House, belonging to the defendant, situate in the borough of Greenwich, was subject to the payment of a perpetual rent-charge of 3*l.* for the benefit of the charity known as “The Herbage Rents,” in the said borough, regulated by the scheme of the Charity Commissioners, dated January 16, 1877; that an account might be taken of what was due in respect of the arrears of the rent-charge, and that the defendant might be ordered to pay what should be found due to the Official Trustees of Charitable Funds.

The charity consisted of certain rents and certain sums of Consols, representing redeemed rents, payable in respect of lands inclosed from the common land called Blackheath, which formed part of the Crown manor of East Greenwich. The origin of these rents was not known; but they appeared to have been payable to the churchwardens of the parish of Greenwich by the occupiers of the inclosed lands.

By an order of the Charity Commissioners of January 16, 1877, a scheme for the regulation of various charities, including the Herbage Rents, was established, by which the unredeemed rents were vested in the Official Trustees of Charity Lands, and

STIRLING J. became payable to the trustees of the charities comprised in the scheme.

1896

*In re*

HERBAGE  
RENTS,  
GREENWICH.

CHARITY  
COMMISSIONERS

*v.*  
GREEN.

These rents included a yearly sum of 3*l.*, payable in respect of Macartney House, Greenwich.

By an indenture of lease, dated September 12, 1887, Macartney House was demised by the Crown to the defendant for twenty-one years from October 10, 1886, at the rent of 150*l.* Since that date the house had been in the defendant's personal occupation as a private residence, and he had not received any rents or profits whatever from the premises. The defendant had since his occupation always declined to pay the rent-charge to the charity.

The Crown was not made a party to the summons; but the defendant gave notice of the proceedings to the Commissioners of Woods and Forests, and ascertained from them that they did not dispute the liability of the premises to the rent-charge.

*Vaughan Hawkins*, for the plaintiffs. Under the old law the remedy to recover a freehold rent was by real action, and as long as the freehold continued debt could not be maintained, because the existence of the superior remedy operated as a bar to the exercise of the inferior remedy; but when the freehold came to an end, then, inasmuch as a real action would no longer lie, debt would lie for the arrears. But real actions having been abolished by 3 & 4 Will. 4, c. 27, the grantee of a rent-charge may now always maintain an action of debt against the terre tenant: *Thomas v. Sylvester* (1); *Christie v. Barker* (2); *Searle v. Cooke*. (3)

The pignor of the rents and profits of land subject to a rent-charge created by a former tenant in fee was formerly liable to a real action, and is now liable to an action of debt (per Quain J. in *Thomas v. Sylvester* (4)), and the pignor of the rents and profits is the person in actual enjoyment of the land, and not the landlord, who takes nothing beyond the rent incident to the reversion: Year Book, 22 Hen. 6, fol. 16; and the tenant's goods are liable to distress for arrears of the rent-charge:

(1) L. R. 8 Q. B. 368.

(2) 53 L. J. (Q.B.) 537.

(3) 43 Ch. D. 519, 532.

(4) L. R. 8 Q. B. 372.

*Woodford Parish v. Parkhurst* (1); Gilbert on Rents, pp. 75, STIRLING J. 100. [Upon this point he also referred to *Cook v. Fountain* (2) and *Grant v. Ellis*. (3)]

Assuming that a doubt exists as to where the legal action lies, this is not a legal action for debt, but is in the nature of a suit for breach of trust in regard to charitable uses, and the defendant may be made personally liable on that ground also: Story's Equity Jurisprudence, §§ 1161-1163. The liability of the tenant to pay the rent-charge to the charity is a personal liability which may be enforced by the Attorney-General, or, in cases under the Charitable Trusts (Recovery) Act, 1891, by the Charity Commissioners, and it is not necessary that all the parties interested in the land subject to the rent-charge should be made parties to the action: *Attorney-General v. Jackson* (4); *Attorney-General v. Naylor*. (5)

*Ingles Joyce*, for the defendant. This is a novel demand. There is no authority for saying that a lessee for a term of years at a rack-rent can be made personally liable for a rent-charge to which the fee simple is subject.

*Thomas v. Sylvester* (6) and the other cases which have followed it do not touch this case, because there the tenant was in for all the estate of the grantor. An action of this kind will not lie against a person who is not the freeholder. The terre tenant is the person who has the seisin of the land, and does not include a tenant for years: Sweet's Law Dictionary.

A lessor to whom rent is reserved cannot proceed personally against a sub-lessee, because the sub-lessee has not all the estate of the lessee: *Holford v. Hatch*. (7) That principle applies by analogy to the present case.

In order that this action should be maintained, it is essential that the defendant should have all the estate of the grantor: *Swift v. Kelly*. (8)

Here the pernor of the rents and profits is the Crown. Assuming that the defendant's goods are liable to distress for the

1896

*In re*  
HERBAGE  
RENTS,  
GREENWICH.  
CHARITY  
COMMISSIONERS  
v.  
GREEN.

(1) Duke on Charitable Uses, p. 70.

(2) 3 Swans. 585, 595.

(3) 9 M. &amp; W. 113, 123.

(4) 11 Ves. 365.

(5) 1 H. &amp; M. 809.

(6) L. R. 8 Q. B. 368.

(7) 1 Dougl. 183.

(8) 24 L. R. Ir. 478.

STIRLING J. arrears of the rent-charge, that affords no proof of any personal liability on the part of the defendant. Putting aside the question of charity, the legal owner of the rent-charge cannot maintain an action against the defendant, and the fact that the rent-charge is for a charity will not make him liable if he was not liable independently.

1896  
*In re*  
 HERBAGE  
 RENTS,  
 GREENWICH.  
 CHARITY  
 COMMISSIONERS  
*v.*  
 GREEN.

[STIRLING J. referred to a passage in Tudor on Charitable Trusts, 3rd ed. p. 244, to the effect that "a person whose land is subject to a rent-charge in favour of a charity commits a breach of trust if he ceases to pay the rent."]

That passage can only apply to the person who has the seisin of the land.

Further, the Crown is a necessary party to the action.

*Vaughan Hawkins*, in reply. It has been held that the landlord is not the pernor of the rents and profits; it follows, therefore, that if the owner of land subject to a rent-charge makes a lease, unless the lessee can be sued, there is nobody who can be sued.

[STIRLING J. But assuming the lessee to be the pernor of the rents and profits, it is said that no action will lie against him because he is not in for the whole estate of the lessor.]

The action will lie against a tenant for life: *Gilbert on Rents*, p. 95; and if against a tenant for life, why not against a tenant for years?

[STIRLING J. If a tenant for years was liable, why could he not have been sued in a real action?]

So long as real actions existed, the fiction was kept up that the freeholder was in possession: *Bushby v. Dixon* (1); and the law said that there could not co-exist at the same time two forms of action for the same cause of action; but since the abolition of real actions, an action of debt may be brought against the occupier, and there is no ground for saying that he must have the whole fee in him.

*Cur. adv. vult.*

Aug. 5. STIRLING J. This is a summons by the Charity Commissioners under the statute 54 & 55 Vict. c. 17, asking



that it may be declared that the freehold messuage called **STIRLING J.** Macartney House, belonging to the defendant, situate in the borough of Greenwich, is subject to the payment of a perpetual rent-charge of 3*l.* for the benefit of the charity known as the Herbage Rents in the said borough, regulated by a scheme of the Charity Commissioners dated January 16, 1877; that an account may be taken of what is due in respect of arrears of the rent-charge; and that the defendant may be ordered to pay what may be found due to the official trustees of the charitable funds.

1896  
*In re*  
**HERBAGE  
 RENTS,  
 GREENWICH.**  
**CHARITY  
 COMMIS-  
 SIONERS  
 v.  
 GREEN.**

Macartney House forms part of the possessions of the Crown, and was by an indenture dated September 12, 1887, demised to the defendant for the term of twenty-one years from October 10, 1886, at the rent of 150*l.* The defendant has ever since October 10, 1886, been in personal occupation of the house as a private residence exclusively, and he states in his affidavit that he has not, nor has any one on his behalf, received any rents or profits whatever from the premises, or any part thereof. It is to be observed that the lessee is the sole respondent of the summons. The Commissioners of Woods and Forests have been communicated with, and state that the Crown does not dispute that the property is subject to the payment of the rent-charge in question. I think, therefore, that it is unnecessary that any one should be made a party as representing the Crown.

It was not disputed on behalf of the defendant that the proceedings were properly instituted under the statute 54 & 55 Vict. c. 17, nor that, regard being had to the provisions of s. 5, sub-s. 2, it must be taken that the house in question is liable to the rent-charge. In whom that rent-charge is legally vested does not appear. The rent-charge has not been paid during the occupancy of the defendant. It is not disputed that the legal owner of the rent-charge, if known, might have distrained for the arrears. If an order were made vesting the legal rent-charge in trustees for the charity, I apprehend those trustees might distrain and seize the tenant's goods. This course, however, has not been adopted. The question which is raised by the summons is whether the defendant as tenant for years of

STIRLING J. the property subject to the rent-charge is personally liable for the payment of those arrears. Regard being had to the not infrequent occurrence of charitable rent-charges of small amount such as that which is the subject of these proceedings, the question is one of considerable importance. It is also one of some difficulty, and cannot be decided simply on considerations turning on the liability of the defendant's goods to distress; for the goods of a perfect stranger might be taken in distress if they happened to be on the land, although no action would lie against him. The liability of the defendant was sought to be based on two grounds. It was said (1.) that under the present law the occupier of land subject to a rent-charge is liable to an action for debt in respect of arrears of the rent-charge; and (2.) that even if that was not so as regards rent-charges generally, still there was in the case of a charitable rent-charge a personal duty to pay which might be enforced by the Attorney-General, and under the statute 54 & 55 Vict. c. 17, by the Charity Commissioners. These two positions I propose to consider separately in the order in which I have stated them.

The question being one of personal liability, I do not concern myself with the legal remedy by distress of goods found on the land charged, or the equitable remedy against the land itself, as illustrated in a series of cases of which *Cupit v. Jackson* (1) and *Hambro v. Hambro* (2) may be taken as examples.

The leading authority on the liability of the possessors of lands subject to a rent-charge to an action for debt is *Thomas v. Sylvester*. (3) There the declaration stated "that the plaintiff, being seised in fee of certain messuages, granted them by indenture to C., subject to the payment to the plaintiff, his heirs and assigns, of a rent-charge, and C. covenanted to pay the rent-charge; that afterwards all the estate of C. vested in the defendant, who did not pay the rent-charge"; and it was held on demurrer that the declaration was good. The person there sued was the person in whom the land had become vested for all the estate of the grantor of the rent-charge, and the grounds on which he was held liable are thus stated by Blackburn J.

(1) 13 Price, 721. (2) [1894] 2 Ch. 564.

(3) L. R. 8 Q. B. 368.

1896  
*In re*  
 HERBAGE  
 RENTS,  
 GREENWICH.  
 CHARITY  
 COMMIS-  
 SIONERS  
*v.*  
 GREEN.

He says (1) : " I think the only question which it is necessary to decide is, whether the plaintiff, the grantee of the rent-charge, is entitled to compel the terre-tenants to pay it by a personal action. I may remark that the indenture may be regarded as containing a grant in fee of a rent-charge under the Statute of Uses, and that a rent having been duly created, debt will lie. Under the old law the remedy to recover a freehold rent was by real action, and as long as the freehold continued debt could not be maintained ; but when the freehold estate came to an end, then, inasmuch as a real action could no longer be brought, debt would lie at the suit of the person entitled to the rent-charge." Then, after discussing some of the old cases, he said : " If the present case had occurred before the passing of 3 & 4 Will. 4, c. 27, the rent-charge being in fee, the plaintiff would have been driven to a real action to recover it. But the Legislature having by that Act abolished real actions, we have to consider the question, whether we must not apply the principle of the common law to the present case. The principle was, that, when the estate for life had terminated, an action of debt for arrearages would lie. It seems to me to follow, upon a similar principle, that when the real action has been abolished the grantee of a rent-charge in fee may maintain an action of debt against the terre-tenant ; and this was the opinion of Pollock C.B. in *Varley v. Leigh* (2), though that opinion was not necessary to the decision, and Rolfe B. did not concur. The authorities brought before us, however, were not cited. I think that real actions being now abolished, debt will lie ; and that the authorities shew that it will lie against the assignee of the land as well as against the original grantor. This is not a question of a covenant running with the land, but whether, where there is a rent in fee issuing out of land, the owner of the rent may not sue the terre-tenant in debt, although the terre-tenant was not the original grantor. It seems to me that, according to authority, reason, and justice, he may maintain the action." Quain J. puts it thus : " If a man comes into possession of land as tenant in fee, he is the pernor of the profits of the land, and was liable to a real action for the

STIRLING J.  
1896  
In re  
HERBAGE  
RENTS,  
GREENWICH.  
CHARITY  
COMMISSIONERS  
v.  
GREEN.

(1) L. R. 8 Q. B. 370.

(2) 2 Ex. 446.

STIRLING J. non-payment of a rent-charge created by a former tenant in fee ; if  
 1896  
 ~~~~~  
 In re
 HERBAGE
 RENTS,
 GREENWICH.
 CHARITY
 COMMIS-
 SIONERS
 v.
 GREEN.
 ———

this be so, since real actions are abolished, an action of debt will lie." This case was followed by the Court of Appeal in England in *Christie v. Barker* (1), where it was held that the action of debt would lie against the owner and occupier of a portion only of the lands subject to the rent-charge. In *In re Blackburn and District Benefit Building Society* (2) it was explained by the Court of Appeal that, though an action of debt lay, the rent-charge itself did not constitute a debt. Cotton L.J. says : " Undoubtedly an action for debt may be brought against the terre-tenant for a rent-charge. That was decided in *Thomas v. Sylvester*. (3) It is not that there is any charge on them on account of their holding the land, but only that when the land is vested in any one he contracts a liability to pay the rent-charge while he holds the land." It was held that the liquidators of the society, who got no profits and did their best to get rid of the land, were not personally liable. In *Searle v. Cooke* (4) the Court of Appeal again followed *Thomas v. Sylvester* (3), and ordered the tenant on the roll of copyholds, who was in possession and receipt of the rents to an amount exceeding the rent-charge, to pay personally the arrears of the rent-charge.

In *Swift v. Kelly* (5) it was held by the Court of Queen's Bench in Ireland that where by a marriage settlement lands were granted to a trustee to the use that A., in case she should survive the settlor, should after his decease take and enjoy for her own benefit a yearly rent-charge of 150*l.* by way of jointure during her life, and subject thereto to the use of the trustees for the term of 100 years upon trust for securing payment of the rent-charge, and subject thereto to the use of the grantor in fee, and the grantor died having devised the lands to the defendant, who entered into possession, the defendant as terre-tenant was liable to an action of debt, whether he received profits from the land or not ; but this was reversed on appeal on the ground of the existence of the term of 100 years. It was afterwards held by the Vice-Chancellor of Ireland in

(1) 53 L. J. (Q.B.) 537.

(3) L. R. 8 Q. B. 368.

(2) 42 Ch. D. 343, 349.

(4) 43 Ch. D. 519.

(5) 24 L. R. Ir. 107, 478.

Odum v. Thompson (1), that the owner of the rent-charge was STIRLING J. only entitled to the amount of the profits received by the owner of the land. But in a recent case in this country of *Pertwee v. Townsend* (2), Collins J. has come to the same conclusion as that arrived at by the Court of Queen's Bench in Ireland, namely, that where the action lies the owner of the rent-charge is entitled to recover whether the defendant in possession has or has not received rents and profits. I have had an opportunity of reading the judgment, and I agree with the conclusion at which the learned judge arrived. The fact, therefore, if such it is, that the respondent has not received any profits from his occupation, affords no answer to the claim made against him. In all these cases, however, the action was brought against the owner in fee of the land, and the question of whether a tenant for years is liable to an action for debt is one on which I have been unable to find any reported authority, and I feel compelled to enter into the consideration of the law as found in the earlier authorities.

In s. 233 of Littleton the nature of the remedy given to the owner of a rent-seck is thus stated: "If a man which hath a rent secke, be once seised of any parcell of the rent, and after the tenant will not pay the rent behind, this is his remedie. He ought to go by himselfe or by others to the land or tenements out of which the rent is issuing, and there demand the arrearages of the rent; and if the tenant denie to pay it, this deniall is a disseisin of the rent. Also, if the tenant be not then readie to pay it, this is a denial, which is a disseisin of the rent. Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a denial in law, and a disseisin in deed, and of such disseisins he may have an assise of novel disseisin against the tenant, and shall recover the seisin of the rent, and his arrearages, and his dammages, and the costs of his writ and of his plea." And in s. 238 Littleton deals with the case of rent-charge, and says: "Deniall is a disseisin of a rent-charge, as well as of a rent-secke." It appears, therefore, that against the person designated in s. 233 as tenant the owner of the

1896
 In re
 HERBAGE
 RENTS,
 GREENWICH.
 CHARITY
 COMMISSIONERS
 v.
 GREEN.

(1) 31 L. R. Ir. 394.

(2) [1896] 2 Q. B. 129.

STIRLING J. rent-charge might, by assise of novel disseisin, recover, not merely seisin of the rent, but the arrears of the rent-charge and damages. A form of judgment in accordance with the law thus laid down is to be found in Rastell's Entries at p. 78 b; and it appears to me that the conclusion is that the person liable in law for payment of the rent is the person thus designated as tenant. Who is the "tenant" thus referred to? Must he be the tenant of the freehold, or is the tenant for years included? On this light may be thrown if once we discover who is the proper defendant to an assise of novel disseisin for non-payment of rent.

1896

In re

HERBAGE
RENTS,
GREENWICH.CHARITY
COMMISSIONERS
v.

GREEN.

Now this point is discussed in *Brediman's Case*. (1) It was there held that the payment of a rent-charge by the tenant for years created no seisin so as to bind the tenant of the freehold, and enable the owner of the rent-charge to sue by assise of novel disseisin. This decision was supported on several grounds. The first is this: "In respect of the imbecility and smallness of the interest of tenant for years who at the common law could neither prejudice nor draw the estate of freehold in question, for although the recovery against the tenant of the freehold was by agreement, tenant for years could not be received before the Statute of Gloucester, nor could he falsify the recovery before the statute of 21 Hen. 8. So that by the common law, tenant for years was subject to the pleasure of the tenant of the freehold; for he could not falsify a recovery of the freehold in respect of the feebleness of his estate, and none by the common law could falsify a recovery of the freehold, but he who had a freehold." Later on occurs this: "It was further agreed, that forasmuch as a rent-charge or a rent-seek was against common right, that in an assise thereof all the terre-tenants, sc. the tenants of the freehold (who always are in law intended within these words terre-tenants), ought to be named . . . And thereupon it was concluded, that if in case of disseisin which is tortious, and privation of seisin, the tenants of the freehold ought to be named and made party, a fortiori, in the case of seisin, which in this case is creation of remedy for the rent, the tenant of

(1) 6 Rep. 56 b.

the freehold ought to be party and principal agent in the perfection thereof." It appears, therefore, that in an assise of novel disseisin all the terre-tenants (meaning thereby the tenants of the freehold) whose lands were liable for payment of rent ought to be named; and it was further laid down that if they were not named the defendant might plead in abatement: see Dyer's Reports, fol. 31 b, pl. 216. According to our modern practice, as has been decided in the case to which I already referred of *Christie v. Barker* (1), it is no longer necessary that all terre-tenants should be parties; but the passage which I have just quoted appears to me to shew that the tenant of the freehold was the proper and necessary defendant to an action of novel disseisin for rent-charge or rent-seek, and *primâ facie*, therefore, the person contemplated in s. 233 of Littleton as liable for payment of it.

In *Oguel's Case* (2) it was held that so long as the rent-charge continued an action of debt could not lie. In *Lillingston's Case* (3) it was held that, when the rent-charge ceased an action of debt would lie, even though the deed creating the rent-charge contained a provision that the grantor should not be charged on a writ of annuity; and the report states the law thus (4): "It was also resolved, that although there is an express proviso that the person shall not be charged in a writ of annuity, yet, in such case after the annuity or rent determined, the person of the terre-tenant shall be charged in debt for the arrearages, because the annuity is determined, and he hath no other remedy." The person, therefore, against whom the action lay was the terre-tenant—that is, as is laid down in *Brediman's Case* (5), the tenant of the freehold. One reason why a tenant for years could not by payment of the rent give seisin as against the tenant of the freehold was, as already pointed out in *Brediman's Case* (5), "the imbecility and smallness of the interest of tenant for years." Where the freehold interest is preceded by a chattel interest only, the freehold is (see Burton's Compendium, 8th ed. p. 270) a present interest in most of the circumstances

1896
In re
 HERBAGE
 RENTS,
 GREENWICH.
 CHARITY
 COMMIS-
 SIONERS
 v.
 GREEN.

(1) 53 L. J. (Q.B.) 537.

(3) 7 Rep. 38 a.

(2) 4 Rep. 48 b.

(4) Ibid. 39 b.

(5) 6 Rep. 56 b.

STIRLING J. and incidents of title. The freeholder is in possession through the tenant for years, who in early times was looked upon by the law as merely the bailiff of the freeholder. This may be the reason why no mention is made in these early cases of the tenant for years being liable in an action for non-payment of the rent-charge, and in only one reported case have I been able to find any judgment against the tenant for years. That is the case of *Cutts v. West* (1), and there the tenant for years not merely did not pay the rent-charge, but deliberately paid it to a person not entitled. It was there held that the true owner might, under the circumstances, treat him as a disseisor, and have a remedy against him by assise.

By the statute 32 Hen. 8, c. 37, provision was made for the recovery of arrears of rents in certain cases where the common law gave either no remedy or an imperfect remedy; and under the statute the liability of the tenant for years was discussed in three cases, but was not finally determined. The first is the case of *Lambert v. Austin*. (2) I will read from the report in Cro. Eliz. There "the defendant avowed upon 32 Hen. 8, c. 37, as executor; for that Lady Southwell was seised in fee of the manor of Weston, and 3 Eliz. granted a rent of 5*l.* per annum to Richard Adamson for his life, issuing out of the manor, who made the defendant his executor, and died 28 Eliz., and for ten years arrearages between 17 & 28 Eliz. he avowed. The plaintiff replied, that after the grant scil. 12 Eliz., Lady Southwell made a feoffment of this manor to Copley, who 13 Eliz. let the land to Bocket for twenty-one years, which occupied it for the term, which expired 34 Eliz., and afterwards Copley let it to the plaintiff for three years; upon whom the distress was taken, and upon this it was demurred." "The question," it is stated by the reporter, "rests only for the rent incurred during the term, if by the statute he may distrain for it after the term expired, upon him in the reversion." It was held by Gawdy and Fenner JJ. that "The tenant of the freehold is only to be charged, for an assize only lieth against him, and he is the party that is to attorn; and the lessee for years is only chargeable for his cattle being upon the land, as a stranger

(1) Dyer, fol. 141 b, pl. 47.

(2) Cro. Eliz. 332; Owen's Rep. 117.

shall be in that case ; and the intent of the statute was only to give remedy against him who was chargeable in the life of the testator." Clench and Popham JJ. contra : " That the tenant for years is only chargeable in debt, for the rent incurred during the years, and not the tenant of the freehold, and both are chargeable, one with an assise, and the other with a distress during the estate. Then it is to be considered in this case who is chargeable by the intent of the statute." Then they discuss the liability under the statute. The Court was equally divided on the question, and no decision appears to have been come to. It will be observed, however, that all the members of the Court are agreed that during the continuance of the rent-charge assise lay against the tenant of the freehold, and that the tenant for years could only be affected by distress. It is not suggested that in the cases in which the common law gave a right of action of debt the tenant for years could be sued, and the point on which a difference of opinion arose was really on the true construction of 32 Hen. 8, c. 37. The same question was raised in *Bingham and Parkhurst's Case* (1), and caused a similar division of opinion ; but no decision was called for in the peculiar circumstances of the case.

In *Dunsh v. Smith* (2) an action was brought under the statute 32 Hen. 8 for arrears of a rent-charge against a mere occupier. The report is very short, and runs thus : " In an action of debt brought by an executor for the arrears of a rent-charge, upon the statute of 32 Hen. 8, the plaintiff declares that the defendant in the life of the testator did enter into the land out of which the rent was issuing, and occupied it, and took the profits thereof by the space of five years : and demands the arrears of the rent for that time. And after a verdict for the plaintiff, Mainard moved that the action will not lie for the arrears against the occupiers, for the statute gives it against the tenants of the land. To which Hale answered, that at the common law the action lay against him that took the profits of the land, and against the husband that was seized in right of his wife. (2.) That this action is given in lieu of a distress ; and the beasts of the occupiers were chargeable to the distress.

(1) Littleton's Rep. 93.

(2) Aley's Rep. 62.

1896
In re
 HERBAGE
 RENTS,
 GREENWICH.
 CHARITY
 COMMISSIONERS.
v.
 GREEN.

STIRLING J. (3.) That it would be convenient that the plaintiff should be compelled to inquire out in whom the estate was of right: But judgment was stayed. And Roll doubted of the case; but inclined against the plaintiff."

1896
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*In re*  
 HERBAGE  
 RENTS,  
 GREENWICH.  
 CHARITY  
 COMMISSIONERS  
 v.  
 GREEN.

This was an action brought against a mere occupier, and it would be inconsistent with the decision arrived at by the Court of Appeal in Ireland in *Swift v. Kelly* (1) now to hold that mere occupation imposed an obligation to pay the rent-charge.

Such is the state of the authorities so far as I have been able to discover; and in my judgment they do not support the conclusion that a mere tenant for years is liable in an action of debt for non-payment of a rent-charge issuing out of the land of which he is in occupation, except under special circumstances such as occurred in *Cutts v. West*. (2)

I now pass on to consider the second position, namely, whether, if the Attorney-General were suing, he could recover from the defendant the amount of arrears in an action in the Chancery Division. It is well established that the Attorney-General may enforce payment of arrears of a rent-charge created in favour of a charity against the person liable for the payment. Examples are to be found in *Attorney-General v. Bolton* (3) and *Attorney-General v. Gascoigne*. (4) In the cases of *Attorney-General v. Jackson* (5) and *Attorney-General v. Naylor* (6), which were cited and relied on in the argument, the suits are spoken of as directed against the terre-tenants of the freehold, and in no case, so far as I have been able to find, has the defendant ever been a mere tenant for years.

In *Woodford Parish v. Parkhurst*, Duke's Charitable Uses, p. 70, the case was this: "Sir Henry Leigh did purchase copyhold lands in Woodford, in the name of two of his younger sons, and their heirs, they being within age; and by his will, deviseth to Sir William Martin, and other parishioners of Woodford, and their heirs, a rent-charge of 40s. per annum out of this copyhold land, for relief of the poor there, and dies: Sir William Martin purchaseth this land, and enjoys

(1) 24 L. R. Ir. 478.

(2) Dyer, fol. 141 b, pl. 47.

(3) 3 Anstr. 820.

(4) 2 My. & K. 647.

(5) 11 Ves. 365.

(6) 1 H. & M. 809.

it for many years, and then sells the land unto Parkhurst and STIRLING J. his heirs : Parkhurst hath notice of the charitable use : between the surrender and his admittance, the commissioners decree Parkhurst to pay all the arrearages since Sir Henry Leigh's death ; and upon his appeal the Lord Keeper resolved these points " (I pass by the first, as not being material) : " Secondly, resolved, that the rent, although it was extinct in law, by Sir William Martin's purchase, yet by the commissioners' decree it is revived. Thirdly, resolved, the rent is not extinct by this purchase, although he had no notice of the same, for that the purchase is of another thing than was given to the charitable use. Fourthly, resolved, that the rent is a charge which goes with the land, in whose hands soever it comes, and a distress may be taken for the arrearages, upon the ter-tenant, for the time it was in arrear in other hands ; and the owner's remedy, to have contribution against all others that enjoyed the land before him, is by suit in Chancery ; and here Parkhurst, by the decree, had contribution against all others that enjoyed the land charged, and suffered arrearages to accrue in their time." There the remedy by distress is spoken of, but still only as against the terre-tenant or tenant of the freehold, and there are to be found other passages in Duke to the like effect. I have considered them all ; but in my judgment they do not go beyond this, that when a legal rent-charge has been created for charitable purposes the Attorney-General may in equity enforce payment against the persons legally liable to pay, even although the legal title to the rent-charge may not be clear or be defective.

1896  
In re  
HERBAGE  
RENTS,  
GREENWICH.  
CHARITY  
COMMISSIONERS  
v.  
GREEN.

I therefore come to the conclusion that it is not made out, in the absence of special circumstances, that the tenant for years is legally liable, and I think that the present summons fails and must be dismissed.

Solicitors : *Clabon ; Ingle, Holmes & Sons.*

H. B. H.

STIRLING J.

EHRMANN v. EHRMANN.

1896

Aug. 7.

[1894 E. 762.]

*Practice—Discovery—Production of Documents—Sealing up—Privilege—Relevancy—Inspection by Court or Judge—Jurisdiction—Rules of the Supreme Court, 1883, Order XXXI., r. 19A, sub-r. 2.*

The word “privilege” in Order XXXI., r. 19A, sub-r. 2, is not to be construed in a narrow sense so as to exclude the case of an objection to discovery based on the ground of irrelevancy. It includes any ground on which inspection is sought to be resisted.

## MOTION.

The plaintiffs and defendant carried on the business of wine and spirit merchants in co-partnership; and in this action the plaintiffs sought to have the partnership dissolved on the ground that the defendant by his conduct had prejudicially affected the carrying on of the business, and had committed various breaches of the partnership agreement.

The plaintiffs had by their affidavit of documents disclosed certain books, called journey address books, which contained the names and addresses of customers of the firm upon whom one of the plaintiffs in the discharge of his duties as traveller for the firm was in the habit of calling for the purpose of soliciting orders. The books also contained various memoranda with regard to the customers and their requirements, and notes relating to private affairs of the plaintiff to whom the books belonged. Before producing the books the plaintiffs had sealed up portions of them on the ground that they were not relevant to the matters in question in the action, or any of them.

This was a motion by the defendant asking that the sealed-up portions of the books might be unsealed.

*Buckley, Q.C.*, and *Henry Terrell*, for the defendant, relied upon Order XXXI., r. 19A, sub-r. 2.

*Hastings, Q.C.*, *J. M. Solomon*, and *T. Willes Chitty*, for the plaintiffs. This is not a question of a claim of privilege. We do not claim privilege for the sealed-up portions of the books;



we only say that they are not relevant. The rule, therefore, STIRLING J. does not apply, and the Court has no jurisdiction to inspect the sealed-up portions. All the books of practice invariably treat "privilege" as distinct from irrelevancy: *The Annual Practice*, 1896, p. 615; *Seton on Decrees*, 5th ed. pp. 73-75.

1896  
 EHRMANN  
 v.  
 EHRMANN.

*Buckley, Q.C.*, in reply. The Court has always had power to unseal in order to test the truth of an affidavit claiming privilege for documents which have been sealed up: *Bray on Discovery*, pp. 234, 235. But the case is now governed by Order XXXI., r. 19A, sub-r. 2. The Court will not restrict the meaning of the word "privilege" in that rule to the narrow sense suggested on behalf of the plaintiffs.

STIRLING J. On behalf of the defendant, I am referred to Order XXXI., r. 19A, sub-r. 2, which says: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." It is said for the plaintiffs that that rule does not apply, because "privilege" there is to be read in a narrow sense, and as not extending to an objection to discovery based on the ground of irrelevancy. I am referred to two text-books, namely, the *Annual Practice* and *Seton on Decrees*, in both of which, it is said, in discussing questions as to discovery, "privilege" is used in a narrow sense. For example, in the *Annual Practice*, at p. 615, it is put: "Grounds on which discovery can be resisted. If the discovery required is clearly relevant there are four grounds only upon which it can be resisted as of right, (a) as being criminatory or penal, (b) as being within the doctrine of legal professional privilege, (c) as disclosing the party's evidence, (d) as being injurious to public interests." I am not quite sure whether the argument extends to limiting the word "privilege" to that which is described "as being within the doctrine of legal professional privilege," or whether it extends to all four grounds, but excludes irrelevancy. The narrowest meaning of all certainly would be that of legal professional privilege. Again, in *Seton on Decrees* the grounds of objection to discovery are

STIRLING J. put in this form : first, irrelevancy ; secondly, discovery relating exclusively to his own case ; thirdly, premature discovery ; and then privilege under various heads ; and again it is said that I am to read “ privilege ” in that rule in some sense such as to exclude irrelevancy. Now, I do not think that I ought so to read that rule. It seems to me that by the word “ privilege ” there is meant any ground on which inspection is sought to be resisted ; and that it is not limited to the narrow sense. There has not been cited any passage in the rules in which the word is used in that limited sense ; and, when one looks at the reason of the thing, it seems to me that the present case falls within the mischief which the rule was intended to meet. Cases have occurred in which the person making an affidavit has claimed privilege from production on a ground which was strongly suspected by the Court to be unfounded ; but the Court, being bound by the affidavit according to the old practice, was unable, before the trial, to ascertain whether the suspicions which might be formed with regard to the truth of the affidavit were or were not well founded. I remember one case in which production was resisted before the late Master of the Rolls on the ground that the documents related exclusively to the case of the defendant, and he made a proper affidavit to that effect. At the trial, when those documents were produced, the case was decided in favour of the plaintiff, to a large extent on those very documents ; and there are other cases in which similar objections to discovery have been made, and have proved to be unfounded. I believe it was the object of the rule to free the Court from the fetters imposed by the old practice, and enable it to be determined at once whether or no the objection which is sought to be raised is well or ill founded. If that be the object of the rule, it seems to me that an objection to production on the ground of irrelevancy is just as much within the mischief as an objection that the document in question was a communication which fell within the doctrine as to professional privilege, or that it was one which related exclusively to the defendant’s own case. I confess that, having regard to the nature of the affidavit which has been made in this case, I have a very strong suspicion that these books may

1896  
EHRMANN  
v.  
EHRMANN.

turn out not to be within the privilege which is claimed for them; and that portions of them which are sealed up may turn out to be relevant. This is an application for an order for inspection; privilege is claimed for the sealed-up portions on the ground of irrelevancy. It seems to me that it is within the meaning of the order; and I therefore propose to do what the order allows the Court to do—namely, to inspect one of these books myself in order to satisfy myself whether that claim is justly made or not.

Solicitors: *Wild & Wild; Goldberg, Langdon, Barrett & Newall.*

G. A. S.

1896  
EHRMANN  
v.  
EHRMANN.  
—

KEKEWICH

J.

1896

Oct. 29.

*In re* NOBBS.NOBBS *v.* LAW REVERSIONARY INTEREST  
SOCIETY.

[1895 N. 901.]

*Practice—Originating Summons—Construction of Deed—Rules of Supreme Court, Order LIV. A, r. 1—Application by Mortgagor without offering to Redeem.*

Under Order LIV. A, r. 1, a mortgagor may apply by originating summons for the determination of a question of construction arising under the mortgage deed without offering to redeem.

Where the mortgage of a reversionary interest applied under Order LIV., r. 1, for the determination of the question whether, according to the true construction of the mortgage deed, she was entitled to redeem during the period fixed by the deed for the continuance of the loan:—

*Held*, that the Court was bound to decide the question, and ought not to put the mortgagor on the terms of offering to redeem.

ORIGINATING SUMMONS under Order LIV. A for the construction of a mortgage deed.

The plaintiff, Frances Jane Nobbs, under the will of a testator and certain orders of the Chancery Division, was entitled in reversion expectant on the decease of her father Charles Cannon to two shares of the testator's residuary estate, which were now represented by two sums of 1839*l.* Consolidated Stock standing in court to the credit of an action.

By an indenture of mortgage dated April 25, 1892, and made between the plaintiff of the one part and the defendants, the Law Reversionary Interest Society, Limited, of the other part, the plaintiff mortgaged her reversionary interests to the defendants as security for 1100*l.* with interest at 5 per cent. The deed contained the usual covenants for payment of principal and interest, and the usual proviso for redemption, and also a provision that the principal and interest should not be called in during the life of Charles Cannon, but that payment of interest during that period should be forborne and compound interest at 5 per cent. accumulated and capitalized. The deed did not



contain any provision in express terms empowering the defendant society to insist upon the mortgage moneys remaining upon the security of the mortgage until the death of Charles Cannon.

The plaintiff, being desirous of obtaining a further loan on the security of her reversionary interest, was prevented from so doing by the refusal of the defendant society to be paid off on receiving the usual six months' notice, their ground for refusal being that, according to the true construction of the deed, they could not be compelled to accept payment until the death of Charles Cannon.

Accordingly the present summons was taken out by the plaintiff, asking that under the Rules of the Supreme Court, Order LIV. A, r. 1, it might be determined whether, according to the true construction of the indenture of mortgage of April 25, 1892, the plaintiff was entitled to give to the defendant society a valid and effectual notice of her intention, at the expiration of six months from the date thereof, to pay off the principal money and interest owing upon the security of the mortgage, and thereupon to have a reconveyance of the premises comprised in the mortgage, or whether the defendant society were entitled to insist upon the principal moneys remaining upon the security until the death of Charles Cannon. The summons contained no offer by the plaintiff to redeem the defendant society.

The summons was adjourned into court, and now came on for hearing.

*Renshaw, Q.C.*, and *Godefroi*, for the plaintiff, submitted that according to the true construction of the mortgage deed the plaintiff, the mortgagor, was entitled to redeem at any time on giving a proper notice.

*MacSwinney*, for the defendants, the Law Reversionary Interest Society. I take the preliminary objection that it is not competent to the Court to entertain these proceedings in the absence of an offer by the plaintiff, the mortgagor, to redeem. It is perfectly well settled that a mortgagor cannot make his mortgagee a party to any proceedings in reference to the

KEKEWICH  
J.  
1896  
In re  
NOBBS.  
NOBBS  
v.  
LAW  
REVER-  
SIONARY  
INTEREST  
SOCIETY.

KEKEWICH mortgage without offering to redeem him. See *Dalton v. Hayter* (1), where the law is so stated by Lord Langdale. (2) See also *Inman v. Wearing* (3); *Harding v. Tingey* (4); *Hughes v. Cook*. (5).

J.  
1896  
In re  
NOBBS.  
v.  
LAW  
REVER-  
SIONARY  
INTEREST  
SOCIETY.

[KEKEWICH J. There is no doubt about the general rule to which you refer; but the question is whether it ought to be applied to proceedings under Order LIV. A. (6)]

The Judicature Acts and the rules under them are not intended to alter the rights of parties. By offering to redeem, a mortgagor becomes liable to be foreclosed if he does not redeem within the time limited by the judgment. This is a valuable protection to the mortgagee, and the new rule could not have been intended to deprive him of it. Under rule 4 of Order LIV. your Lordship is not bound to determine this question of construction upon the present summons, if you are of opinion that it ought not to be so determined; and it is submitted that as a condition of its being so determined the plaintiff ought to be required to undertake that if she is successful she will redeem the defendants, with the usual consequence of being foreclosed if she does not redeem. [He then argued that upon the construction of the mortgage deed the plaintiff was not entitled to redeem during the life of Charles Cannon.]

No reply was called for.

KEKEWICH J., after dealing with the question of construction, and saying that he found nothing in the terms of the mortgage deed to take away from the plaintiff the power which is inherent in every mortgagor of redeeming at a reasonable time and on reasonable terms, continued as follows:—I turn

- (1) 7 Beav. 313.
- (2) Ibid. 319.
- (3) 3 De G. & Sm. 729, 734.
- (4) 12 W. R. 684.
- (5) 34 Beav. 407, 410.
- (6) Order LIV. A, r. 1, is as follows:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating

summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

By r. 4, "The Court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

now to the preliminary objection, which deserves separate consideration, not only because it goes to the whole root of the matter, but because it is concerned with the working of a new rule which was intended to be one of far-reaching importance and of great benefit to suitors. The procedure by originating summons in Chancery, which has given rise to a great increase of business during the past few years, has enabled the Court to construe a large number of wills and other instruments without the necessity of an action being brought to trial. That procedure has been found extremely beneficial, and by this Order LIV. A, the beneficial effect was intended to be extended not only to any Division of the High Court, but also to other instruments besides those which until recently had been the subject of the procedure by originating summons. [His Lordship here read Order LIV. A, r. 1, and continued :—]

The point which I have to decide is a question of construction arising under a mortgage deed, which is clearly a written instrument within the words of the rule ; but it is contended on behalf of the defendants that I ought not to decide the point in this case because the instrument is a mortgage deed, and the person claiming to have the deed construed is a mortgagor, and there is no offer by her to redeem. It is perfectly well settled, indeed engrained in the practice of the Court, that no mortgagor can bring an action against the mortgagee in respect of the mortgage without offering to redeem, and the reason is perfectly plain, and is commented on in the case of *Dalton v. Hayter* (1), before Lord Langdale. A decree for redemption is also a decree for foreclosure, and a mortgagor seeking to redeem can only do so subject to the penalty of being foreclosed if he does not redeem within the time limited ; and therefore it is very important that the mortgagor should not be allowed to come and harass the mortgagee without offering to redeem. The rule is for the protection of the mortgagee in view of the doctrine of Courts of Equity which confers on the mortgagor a power to redeem. Ought I to apply that rule to proceedings

(1) 7 Beav. 313.

KEKEWICH  
J.  
1896  
In re  
NOBBS  
NOBBS  
v.  
LAW  
REVER-  
SIONARY  
INTEREST  
SOCIETY.

KEKEWICH under Order LIV. A? It seems to me that if I were to do so I should be running counter to that which, as is notorious outside the rule and apparent from the rule itself, was the intention of the framers of it, namely, to facilitate the determination of short questions of construction which could be examined without affidavits upon the instrument itself, and to make the determination expeditious, easy, and inexpensive. If I were to apply here the rule of equity which requires a mortgagor to offer to redeem, the result would be to import a foreclosure or redemption action into every summons for the construction of a mortgage, or otherwise to say that Order LIV. A, r. 1, is applicable only to persons interested under any deed other than a mortgage. Then it is argued that if this point is to be now decided, at all events the plaintiff ought to be put on terms to say whether she will redeem or not, and that an offer by her to redeem ought to be made a condition of deciding this question on originating summons. That seems to me to be thoroughly untenable. Either I have jurisdiction under the rule or I have not. If I have jurisdiction, then I think that I am bound to decide the question under the rule. If I have not jurisdiction, because this is not a case to which the rule applies, I cannot see how I can, under this rule, listen to the originating summons upon any conditions. I do not see how I can possibly in any case say, "This is an originating summons which I am not competent to hear, but which I will hear and decide if the plaintiff will agree to such and such terms." It may be that a plaintiff and defendant may agree together not to raise an objection, but that cannot give the Court jurisdiction. It may prevent the Court of Appeal disturbing the order when made, but it cannot give the Court a jurisdiction which the rule does not give. I think, therefore, that, as this question is one which can properly be determined on originating summons, I am bound to overrule this preliminary objection, and to give my decision upon the question, and I do so by saying that upon the true construction of the mortgage deed the plaintiff is entitled to redeem the security notwithstanding that the tenant for life, Charles Cannon, is still alive.

J.  
1896  
In re  
NOBBS.  
NOBBS  
v.  
LAW  
REVER-  
SIONARY  
INTEREST  
SOCIETY.  
—



[His Lordship then dealt with the question of costs, and said that, although if the defendants had been ordinary litigants they might have been ordered to pay costs, yet as they were brought before the Court in the character of mortgagees they ought to be allowed to add their costs to their security.]

Solicitors: *H. Cubitt Ireland; Caprons, Dalton, Hitchins & Brabant.*

C. C. M. D.

KEKEWICH  
J.

1896

*In re*  
NOBBS.

NOBBS

v.

LAW  
REVER-  
SIONARY  
INTEREST  
SOCIETY.

ROMER J.

1896

July 24.

*In re* DOETSCH.  
MATHESON *v.* LUDWIG.

[1894 D. 1558.]

*Foreign Law—Lex ferī—Partnership—Administration of Estate of Deceased Partner.*

Creditors of a firm carrying on business in Spain brought an action in England, on behalf of the firm's creditors, against the executors of a member of the firm (who had died in England leaving property there) claiming that his estate, after payment of his funeral and testamentary expenses and separate debts, was liable for the firm's debts, and asking for administration on that footing. The defence was that the rights of the parties were governed by the law of Spain, under which the firm's creditors were not entitled to proceed against the separate estate of a deceased partner until after they had exhausted the property of the firm:—

*Held*, following *Bullock v. Caird* (L. R. 10 Q. B. 276), that the matter stated in the defence was mere procedure, and that the defence was bad.

THE partnership firm of Sundheim & Doetsch, of which H. M. Doetsch was a member, carried on business as merchants at Huelva in Spain.

Under an agreement in writing dated November 28, 1893, and which was entered into in England, the firm was indebted to Matheson & Co., a firm carrying on business in the City of London.

H. M. Doetsch died in May, 1894, having by his will appointed J. Osborne, G. Ludwig, C. Doetsch, and H. Gwinner his executors.

Osborne renounced probate; and Gwinner, who resided in England, was absent abroad when the action mentioned below was commenced; but the will was proved in England by Ludwig, who lived in London, and by C. Doetsch, who lived sometimes in England and sometimes in Spain.

Matheson & Co., on behalf of the joint creditors of Sundheim & Doetsch, brought an action against Ludwig, C. Doetsch, and Sundheim, alleging that the assets of the firm of Sundheim & Doetsch were insufficient to pay the debt, and that a large balance of it remained due to the plaintiffs, and they claimed a declaration

that the estate of H. M. Doetsch, after satisfying his funeral and testamentary expenses and his separate debts, was liable to the joint debts of his firm, and administration of his estate. ROMER J.

1896

*In re*

DOETSCHE.

MATHESON

v.

LUDWIG.

One of the defences set up by the defendants was that the rights of the plaintiffs against the testator's estate were governed by the law of Spain, and that according to that law the plaintiffs were not entitled to have the estate applied in payment of the debt due from his firm until the plaintiffs had had recourse to and had exhausted the property of the firm.

*Eve, Q.C.*, and *Howard Wright*, for the plaintiffs. There is an English administration action, and the estate must be administered according to the *lex fori*. According to English law the creditor of the partnership may proceed against the separate estate without first proceeding against the joint estate, though of course the separate creditors must first be paid.

It may be that in Spain it is necessary to first exhaust, or at any rate proceed against, the joint estate; but the ultimate right is the same as in England. The difference is, therefore, merely one of machinery or procedure, and the defence is demurrable: *Bullock v. Caird*. (1) In that case the members of the partnership were alive; but there is no doubt as to the right to proceed against the estate of the deceased partner without proving the insolvency of the partnership: *Wilkinson v. Henderson* (2), a case which is treated as settled law in *Lodge v. Prichard* (3), where it is pointed out that the forms of the Court's decrees are based on the view there taken: see *Seton on Decrees*, 2nd ed. p. 280.

The equity of the joint creditor against estate of the deceased partner is also recognised in *Winter v. Innes*. (4)

The bankruptcy law is the same: *Ex parte Melbourne* (5); *Ex parte Holthausen*. (6)

Spanish law in no way affects the point.

[They also referred to *In re Kløbe* (7); *Westlake's Private*

(1) L. R. 10 Q. B. 276.

(4) 4 My. &amp; Cr. 101, 111.

(2) 1 My. &amp; K. 582.

(5) L. R. 6 Ch. 64.

(3) 1 D. J. &amp; S. 610, 614.

(6) L. R. 9 Ch. 722.

(7) 28 Ch. D. 175.

RÓMER J. *International Law*, 1st ed. p. 197; *Thurburn v. Steward* (1);  
 1896 *Pardo v. Bingham*. (2)]

*In re*  
 DOETSCH.  
 MATHESON  
*v.*  
 LUDWIG.

*Cozens-Hardy, Q.C.*, and *Austen-Cartmell*, for the defendants.  
 The contract is governed by the Spanish law; but assuming that the construction of the contract is governed by English law, the Court will recognise the Spanish law as to the rights of the contracting parties.

A partnership in Spain is a separate entity—very much like an unlimited company in England. The primary liability is that of the entity, the members being only liable to the extent of their separate estates. The partnership creditors must exhaust the Spanish assets before coming against the English assets of the deceased partner.

The firm entered into the contract on the footing that the rights of the parties under the contract were to be determined by the law of Spain: *Hamlyn & Co. v. Talisker Distillery*. (3)

The law of Spain, therefore, must regulate the rights of the parties: *Dicey on Domicil*, pp. 151, 152.

The objection goes to the root of the matter, and is not a mere question of circuity of procedure like that in *Bullock v. Caird*. (4) The other cases cited were decided on the same lines, and have no application to this case.

ROMER J. It is admitted that the plaintiffs are creditors of the firm of Sundheim & Doetsch. As such creditors they ask for the usual administration of the estate of Mr. Doetsch, who is dead—that is to say, they ask to have the separate assets of Mr. Doetsch applied in payment of the joint debts after first satisfying the separate creditors. Objection is taken to that relief on the ground that the firm is a Spanish firm, and that by Spanish law the estate of one partner who dies cannot be reached by joint creditors of the firm until the estate of the firm has been proceeded against or is exhausted, or there is a proved insufficiency of the joint estate.

That objection fails, and for this reason. In the first place, it is clear that according to English law, as a matter of pro-

(1) L. R. 3 P. C. 478.

(2) L. R. 6 Eq. 485.

(3) [1894] A. C. 202.

(4) L. R. 10 Q. B. 276.



cedure and to avoid circuity of action, a creditor of a partnership of which one member is dead is entitled as a creditor to share in the administration of the estate of that deceased partner after the separate debts are paid, without first proving that the surviving partner is insolvent and without being obliged first to have recourse to the joint assets. That was settled by *Wilkinson v. Henderson* (1), and other cases which have been cited. Now, from the admissions before me—and there is no other evidence—it appears to me that the Spanish law only differs from the English law in a matter of procedure. The Spanish Courts require that a joint creditor shall before he seeks to reach the estate of a deceased partner first proceed against and exhaust or prove the insolvency of the joint estate. In my opinion, that is a matter of procedure. It is clear that the Spanish firm was not a corporation. On the contrary, the admissions shew that the deceased partner's estate can be reached after proper procedure has been taken to exhaust or prove the insolvency of the joint estate; and certainly it cannot, I think, be successfully contended that the plaintiffs are to be considered as having contracted in any way not to take such proceedings as are before me. Now, that being so, there is nothing to prevent the plaintiffs from asking for the relief which they claim. The procedure of the Spanish Courts does not bind the Courts here; nor does the Spanish law at all affect the right of a creditor here to avail himself of the benefits given by the English Courts in administering estates here. For that *Bullock v. Caird* (2) is a sufficient authority. Speaking generally, English assets have to be distributed according to the English law—according to priorities recognised by Courts in this country—according to the rules of procedure and course of distribution adopted here. That general proposition was pointed out, amongst other places, in *Thurburn v. Steward* (3) by Lord Cairns, who says: “The proper order and priority of distribution of assets is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution.”

ROMER J.

1896

*In re*

DOETSCH.

MATHESON

v.

LUDWIG.

(1) 1 My. &amp; K. 582.

(2) L. R. 10 Q. B. 276.

(3) L. R. 3 P. C. 478, 513.

ROMER J. For these reasons it appears to me that the objection fails. I  
1896 need only add, that in my opinion the contract between the  
*In re* parties on which the plaintiffs' rights turn is to be governed  
DOETSCH by the *lex loci contractûs*—that is to say, by the English law.  
MATHESON

v.  
LUDWIG.  
—

Solicitors for plaintiffs : *Freshfields & Williams.*

Solicitors for defendants : *Norton, Rose, Norton & Co.*

F. E.

ROBINSON v. MONTGOMERYSHIRE BREWERY  
COMPANY.

[1893 R. 1559.]

*Company—Debenture Stock Certificate—Purchaser for Value—Mortgagee—  
Authority of Agent.*

VAUGHAN  
WILLIAMS  
J.

1896

July 30, 31.

A company applied to P., who had acted as its broker, for a loan of 3000*l.* on the security of 8000*l.* of its debenture stock, which was by the trust deed assignable free from equities. P. asked G. to lend 6000*l.* on the stock, and he consented to do so on the certificate for the 8000*l.* stock being deposited. After P. had communicated with the company, its secretary deposited as required a certificate under its seal stating that G. was the registered holder of 8000*l.* debenture stock of the company, and that the stock was only transferable by deed registered in the company's books. G. then paid 6000*l.* to P., who paid the company only 3000*l.* :—

*Held*, that, although the certificate was not a negotiable instrument, G. was entitled to assume that P. had full authority from the company to deal with it, and was not concerned to see that P. paid the 6000*l.* to the company; and that in an action to enforce the rights of the debenture stock holders, G. could prove for 8000*l.* provided he did not receive dividends exceeding 6000*l.* and interest.

THE directors of the Montgomeryshire Brewery Company, Limited, were empowered by its articles to raise money on debentures, and a trust deed was executed to secure debenture stock to the amount of 30,000*l.*, the stock being expressed to be assignable free from equities.

In March, 1891, the company was in need of money, and asked Power & Clegg, who had acted as their stockbrokers, to advance them 3000*l.* on the security of 8000*l.* debenture stock.

Power & Clegg, or a member of their firm, asked W. D. Gillies to advance more than 6000*l.* on the stock; but he declined to lend more than 6000*l.*, or even that sum unless the stock certificate was first deposited with his bankers. Some communication then took place between Power and the company, and on or about March 25, 1891, the secretary of the company deposited a debenture stock certificate with the bankers of Gillies.

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON  
v.  
MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

Gillies thereupon paid 6000*l.* to the credit of Power & Clegg's banking account.

The certificate was under the common seal of the company, and certified that Gillies was "the registered holder of 8000*l.* debenture stock of the " company. At the foot of it was the following statement:—

"The shares (*sic*) are only transferable by deed of transfer stamped and registered in the books of the company."

The minutes of a meeting of the directors of the company held on March 25, 1891, were as follows:—

"Upon considering as to the borrowing of 3000*l.* on the security of 8000*l.* debenture stock, it was resolved that the offer of Messrs. Power & Clegg to lend the company the necessary amount for six months at 5½ per cent. per annum be accepted.

"Upon considering as to the allotment of 8000*l.* debenture stock to Mr. Wm. Don Gillies as security for the sum of 3000*l.* advanced by Messrs. Power & Clegg to the company, it is resolved that the same be and is hereby allotted and the scrip be issued.

"The solicitor to the company having reported that the necessary mortgage deed in connection with the above resolution was prepared, it was resolved that the common seal of the company be affixed thereto.

"Upon consideration as to the expenses for the secretary's travelling to Liverpool and Manchester in connection with the loan, it was resolved that a cheque for 10*l.* be drawn for the same."

On March 25 or 26, 1891, the secretary of the company received from Power a cheque for 3000*l.*; and by a mortgage dated March 26, 1891, the company purported, in consideration of 3000*l.* paid by Power & Clegg as mortgagees, to convey to Power & Clegg "the sum of 8000*l.* five per cent. debenture stock" of the company, "now standing in the name of William Don Gillies," by way of mortgage, to secure 3000*l.* with interest at 5*l.* 10*s.* per cent. per annum.

The company never received more than 3000*l.* from Power & Clegg, and Gillies never communicated to the company the fact that he had paid Power & Clegg the 6000*l.*



A. J. Robinson and A. D. Dawson, the trustees of the debenture stock trust deed, in July, 1893, commenced an action to realize the security, and in October, 1893, a winding-up order was made against the company.

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON

v.

MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

In the action Gillies claimed to prove for 8000*l.* and the dividends thereon; and an application to adjudicate on the claim was adjourned into Court, and opposed by some of the debenture stock holders.

*Crackanthorpe, Q.C.*, and *Christopher James*, for Gillies. Gillies is the registered holder of debenture stock, and holds a certificate under the seal of the company stating that he is the registered holder. Having paid value for the certificate, he is entitled to prove free from any equities between the company and Power & Clegg: *In re General Estates Co.* (1)

It is immaterial whether the security which Gillies holds is transferable at law or not. If the security is legally transferable, it is clear that he holds free from equities; but if he is in the position of an equitable transferee only, the circumstances under which the certificate was issued to him give him an equity superior to that of any other person: *In re Romford Canal Co.* (2)

The general rule, that a chose in action assignable only in equity can only be taken subject to equities, must yield when it appears from the nature or terms of the contract that it was intended to be assignable free from equities: *In re Agra and Masterman's Bank.* (3)

Nor is it material whether the certificate for 8000*l.* stock was or was not delivered in fraud to Gillies, provided he acted in good faith and there was no circumstance to excite his suspicion: *London Joint Stock Bank v. Simmons.* (4)

Although the company only received 3000*l.* from Power & Clegg in respect of the certificate, Gillies did not know of that, and has a better equity than the company, who, by handing the certificate to Power, or putting him in a position to raise money on it, have enabled him to raise a larger sum: *Bickerton*

(1) L. R. 3 Ch. 758.

(3) L. R. 2 Ch. 391, 397.

(2) 24 Ch. D. 85.

(4) [1892] A. C. 201.

VAUGHAN  
WILLIAMS  
J.  
1896  
ROBINSON  
v.  
MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

*v. Walker.* (1) In that case the interest which was mortgaged was only equitable, and it is analogous to this case because the mortgagor was held liable for a larger amount than he had in fact received, because by his acts he had enabled the mortgagee to get the larger amount from an innocent transferee.

The company in this case knew from Power that Gillies was the man from whom the money was coming, and that the certificate was to be made out in his name. The company is clearly estopped from denying Gillies' title to the 8000*l.* stock, and he is entitled to prove for the full amount, provided he does not receive altogether more than he actually advanced, with interest.

*Whinney*, for debenture stock holders opposing the application. The evidence shews that there was no advance by Gillies to the company, but that it was made to Power. The applicant, however, says that Power was the company's agent.

[VAUGHAN WILLIAMS J. The minute-book is evidence of authority by the company to Power to hand the certificate to Gillies.]

But Gillies did not obtain the certificate in reliance on any authority of the company to Power. He got it from the company direct, and it was his duty to see that the company received the 6000*l.* He can only succeed by shewing that Power was the company's agent for the purpose of receiving the money. The mortgage to Power & Clegg shews that the company borrowed from that firm and not from Gillies. The company got the 3000*l.* from Power in exchange for the certificate; and, therefore, it cannot be said that the certificate was entrusted to Power in order that he might borrow money on it: on the exchange being made the transaction was complete. Power was a mere pledgee of the stock, and Gillies was aware that he stood in that relation to the company. The doctrine of purchaser for value cannot be relied on unless the purchaser can shew that he has been dealing with the deliverer as owner. That is shewn by the judgment of Lord Herschell in *London Joint Stock Bank v. Simmons* (2), where he distinguishes *Earl of Sheffield v. London*

(1) 31 Ch. D. 151.

(2) [1892] A. C. 201, 219.

*Joint Stock Bank* (1), pointing out that there the bank dealt with a person whom they knew to be a pledgee, and that they were put upon further inquiry. If Gillies had not notice that Power was a pledgee, he knew at any rate that he was an agent of the company, and, if so, was bound to inquire what were the limits of his authority.

Even if the company is estopped, the other debenture stock holders are not. Only the holders of debenture stock which has been rightly issued take *pari passu*: *Mowatt v. Castle Steel and Iron Works Co.* (2)

*Crackanthorpe, Q.C.*, in reply. In the case last cited the debentures objected to had not been issued at all; whereas we are now dealing with a certificate of stock the propriety of which has never been questioned, the only question being as to the amount for which proof is to be admitted in respect of the stock actually held.

The rule laid down in *Perry Herrick v. Attwood* (3) applies. The company made Power the ostensible owner by giving him the certificate. In effect it was handed to him for the purpose of being delivered by him to Gillies. If Power was not the company's agent, it placed him in a position to represent himself to be acting in that capacity.

VAUGHAN WILLIAMS J. This is a case of some importance, and I hope that the decision which I am going to give is in accordance with the present state of the authorities, because it seems to me that commercial convenience requires that the law should be so.

There is a certain amount of ambiguity about the facts, but I think the essential facts are clear. The company wanted a sum of 3000*l.*, and they were minded to see whether Messrs. Power & Clegg, of Manchester, who had acted occasionally as brokers to the company, would advance the money. I take it for granted that the company knew perfectly well that it was quite likely, as a measure of business, that if Power & Clegg advanced this money they would advance it, not out of their

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON  
v.

MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

(1) 13 App. Cas. 333.

(2) 34 Ch. D. 58, 63.

(3) 2 De G. & J. 21.

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON  
v.

MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

own money, in their hands or standing to their credit at their bankers, but would obtain the money from some of their clients, or from some people with whom they had business connections. In this state of things Power & Clegg put themselves in communication with Mr. Gillies. Having done so, instead of asking Mr. Gillies to advance the sum of 3000*l.*, the sum which the company was desirous of obtaining, they obtained 6000*l.* from him. There is no sort of imputation cast upon Mr. Gillies in this case. It is practically conceded that he acted in a perfectly upright and straightforward manner, and it is not suggested that he knew of any limitation as to the amount which the company desired to obtain, or that he had any knowledge of any facts which ought to have put him upon any inquiry which he abstained from making. There is a sort of suggestion that he was guilty of negligence in not seeing that the 6000*l.* which he advanced came to the hands of the company. But it does not seem to me that in the circumstances of the case there was any obligation upon him to see that the money got to the hands of the company, and, if that is so, of course there is no negligence in his not doing so. What he did was this: He was asked to advance a larger sum than 6000*l.*, but he declined to do it, and said that the utmost he could do was to make an advance of 75 per cent. of the face value of the certificate. It is not disputed that he was invited to make the advance upon the security of this certificate. He said that he should be willing to do it, but that the debenture must be handed to some trustworthy person and deposited before he could advance the money. Upon that happening, some communication must have taken place (exactly what it was I do not know) between Power, of the firm of Power & Clegg, and the company, the result of which was that the secretary of the company was entrusted with the stock certificate; and he brought that document to Manchester and handed it to the chairman of a bank there, and the certificate was filled up with the name of William Don Gillies. The name, of course, had been supplied by Power & Clegg. I find in the company's register of mortgages, under the date of March 25, 1891, an entry of the name of William Don Gillies, and against that name there was



originally entered "Amount received 8000*l*.—Amount of charge, 8000*l*., debenture stock." At some time or other—I am not told when—that figure 8 was altered, apparently by some one else and in another handwriting, and obviously at an entirely different time, into a 3. Upon the document in question being handed to the chairman of the bank, Mr. Gillies advanced the money.

Some question has been raised as to whether Mr. Gillies supposed that the money was being advanced to the company; but I do not know that it is of any very great importance to ascertain that for certain. I have no doubt that in one sense he knew perfectly well that the money was for the company: indeed, I could not doubt it in a sense, because the document appears to be an original certificate issued by the company to him in his own name, and that is the security which he has got; but I do not suppose he knew what the exact relation of Power & Clegg was to the company, and I do not think that he was bound to inquire what it was. It was sufficient for him as a business man that this company was entrusting Power, the person with whom he was dealing, with this certificate; and under these circumstances I think he had a right to suppose that this certificate was one which the company intended that Power should deal with on the basis of his being the person entitled to deal with it. If the company wished in any way to limit the rights of Mr. Gillies, who received this certificate from Power & Clegg, the company should have done so. It seems to me that when persons fill up a certificate of this sort at the instance of some third person the duty is upon them to take care that the third person, who obtains from them this document and hands it over to the person whose name appears upon the face of it, gives notice to such person of any limitation in the representation appearing upon the face of the document which is necessary for their own protection; and, if they do not choose to do that, they cannot be heard to say that the person who deals upon the faith of the representation contained in the document is not entitled to do so; and to the extent that he does so it seems to me that they ought to be held responsible.

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON  
v.  
MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON

v.

MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

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I do not know that there is any need for me to deal at length with the nature of this document ; but I may as well say that, according to my understanding, this document is clearly not a negotiable instrument. The rights that are given under it are equitable rights except in so far that there is this relation between the company and Mr. Gillies. It seems to me that in this particular case, quite apart from any question of what might be the rights of a person who was a mere bearer of this document, it is plain that the document does on the face of it establish a relation, and a contractual relation, between Mr. Gillies and the company—that is to say, by the words certifying that Mr. William Don Gillies is the registered holder of debenture stock in the Montgomeryshire Brewery Company. In that state of things, this document having been issued by the company to Mr. Gillies, and purporting upon the face of it to shew that Mr. Gillies is the registered holder of 8000*l.* stock, it seems to me that it could not be argued but that, if Mr. Gillies had bought this out and out from Power, and if he had no notice of any transaction between Power and the company, he would have been the holder for value of this amount of stock. He did not do that—he did not buy it out and out; he advanced 6000*l.*; and as to that 6000*l.* he, *primâ facie*, is entitled to the benefit of this document just as if he had bought it he would have been entitled to hold it.

But then Mr. Whinney says that, without denying those propositions at all in this particular case, Mr. Gillies had notice of something which prevents him from taking advantage of this document except to the extent of 3000*l.* He says that Mr. Gillies had notice that Power was a pledgee of this document to that extent, and that if Mr. Gillies had that notice he could not recover more than 3000*l.* I entirely agree; but I do not agree in the conclusion which Mr. Whinney asks me to draw, for, in my judgment, he had no notice of the sort.

Then it is said that Mr. Gillies, even if he had not notice that Power was the pledgee of this document, had notice that Power was the agent of the company, and as agent was raising money for the company, and that under these circumstances it was his business to ascertain what were the limits of the authority of

Power. Again I say, without disputing at all that that would be the position of Mr. Gillies, I cannot draw the inference that Mr. Whinney asks me to draw, for I do not agree that Mr. Gillies had any such notice. As I have already said, he had notice in a sense that this money was being raised for the company, but he had no notice beyond that. It seems to me that the one fact which was present to his mind was the fact that the company deliberately put Power into a position to represent them, and that this amount of stock was standing in the name of this gentleman; and it seems to me, as I have already said, if that was all he knew, and if he had bought the document out and out for 8000*l.*, he would have been entitled to prove for the full amount. I do not see that the mere facts that he was asked by Power to advance 6000*l.* on this document, and did advance 6000*l.* upon a certificate for 8000*l.* of debenture stock, and his saying that he would do so upon the production of a certificate to be deposited with some one for him, and that being done, put him upon any further inquiry. It seems to me that the moment this document was produced and put into the hands of a depository he had a right to assume that the company authorized Power to deal with this document; and that it was the business of the company to take care that any restrictions were conveyed to Mr. Gillies, and not the business of Mr. Gillies to inquire whether there were any, and, if so, what. It seems to me, therefore, that Mr. Gillies is entitled to prove for the full amount.

Something was said at the conclusion of Mr. Whinney's argument about estoppel by the company not binding the debenture-holders, and as an authority for that proposition he cited *Mowatt v. Castle Steel and Iron Works Co.* (1); but it seems to me that that case has no application at all. In that case the debentures were not issued at all, and it was contended that under the circumstances not only was there an estoppel which forbade the company from denying that the debentures were valid—I can understand that—but also that, however much an estoppel might bind the company whose debentures were in question, it did not in any way bind the other debenture-

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON

v.  
MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.

VAUGHAN  
WILLIAMS  
J.

1896

ROBINSON  
v.  
MONTGOMERY-  
SHIRE  
BREWERY  
COMPANY.  
—

holders. In the present case the debenture stock certificate was issued, and the only question is the quantum for which Mr. Gillies is entitled to prove, and what is the amount of the advance in respect of which he is entitled to claim. It seems to me that if the company have—and in my judgment they have—put Power in a position where he was master of this document, and could do what he liked with it, and Power has borrowed 6000*l.* upon it, Mr. Gillies is entitled to prove for that 6000*l.*, and that, whether his right as against the company is placed upon estoppel or not, it binds the debenture-holders just as it does the company in face of this certificate, which undoubtedly gives Mr. Gillies the right to be a debenture stock holder. And, with regard to this question of quantum, it seems to me that the estoppel, as between the company and Mr. Gillies, binds not only the company, but also the other debenture-holders. In my judgment, Mr. Gillies is entitled to prove for 8000*l.* until he shall have received dividends for 6000*l.*

Solicitors for applicants : *Clarke, Rawlins & Co.*

Solicitors for opposing debenture-holders : *Sharpe, Parker, Pritchards & Barham, for Mathews, James, Crosskey & Fordham, Birmingham.*

F. E.



*In re* NATIONAL BANK OF WALES.

TAYLOR, PHILLIPS, AND RICKARDS' CASE.

[00149 of 1896.]

VAUGHAN  
WILLIAMS  
J.

1896

Aug. 6, 7.

*Company—Winding-up—Contributory—Transfer of Shares during Voluntary Liquidation—Novation—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 38, 131, 133, 153.*

Under s. 131 of the Companies Act, 1862, a voluntary liquidator, although he may sanction a transfer of shares made after the commencement of the winding-up, and alter the register of members accordingly, has no power to allow an alteration of the status of the transferor so as to free him from his liability as a contributory.

The Court, however, has power to sanction an alteration of status, but ought not to do so unless it is satisfied that someone else is liable as a contributory in the place of the transferor.

A transferee taking shares under a transfer made after the commencement of a voluntary liquidation (even with the sanction of the liquidator) is not liable as a contributory although he may be under liability as a member of the company, but he is bound to indemnify the transferor.

Where, after the commencement of a voluntary winding-up, a shareholder had, with the liquidator's sanction, transferred shares, and the transferee, with the like sanction, had transferred them to a third person, the transferor was retained on the list of contributories, but both transferees were taken off it.

IN May and June, 1893, special resolutions were passed and confirmed for the voluntary winding-up of the National Bank of Wales and for the appointment of liquidators, the resolutions being passed with a view to the amalgamation of the business of the bank with the Metropolitan Bank (of England and Wales), Limited.

At the commencement of the winding-up W. Taylor was on the register of members in respect of thirty shares which were not fully paid up.

Taylor, with the assent of the liquidator (given under s. 131 of the Companies Act, 1862), on November 29, 1893, transferred the shares to W. J. Phillips. The transfer was registered in the register of transfers, Taylor's certificate was cancelled, and a fresh share certificate was issued to Phillips by the liquidator, who also made the usual entries in respect of the shares in the

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

register of members of the company. On May 24, 1894, Phillips, with the consent of the liquidator, transferred the shares to P. A. Rickards. He was put on the register in the place of Phillips, and a certificate was issued and entries were made as in the former case.

Subsequently it became necessary to make calls in respect of the shares, and the liquidator placed Taylor, Phillips, and Rickards on the list of contributories. Taylor, Phillips, and Rickards sought to have their names removed from the list of contributories.

At the hearing, leave was given to Taylor and Phillips to amend by asking also for an order that the status of each applicant, if and so far as the same had not been altered by the registration of his shares, might be altered, and that it might be declared that he had ceased to be a contributory.

*Buckley, Q.C.*, and *Ingpen*, for the liquidator. The question is whether all the classes are liable as contributories, or, if not, which of them are liable.

*Levett, Q.C.*, and *E. C. Macnaghten*, for Taylor. Taylor was the registered holder of shares on which there was a liability—in case of a call being made—at the commencement of the winding-up. His liability continued until he transferred his shares. By s. 131 of the Act of 1862, “whenever a company is wound up voluntarily . . . all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of such winding-up, shall be void.” On a transfer being made with the assent of the liquidator there was a complete novation, and all the liability of Taylor was at an end. If he is not altogether freed from liability, he can only be placed on the B list of contributories.

[VAUGHAN WILLIAMS J. The contract was one of membership, and there was no novation as to that.]

By accepting the transferee a new member was accepted in the place of Taylor. There cannot be two holders, other than joint holders, of a share at the same time. Taylor’s membership ceased when the transfer was accepted.

Sect. 23 of the Act of 1862, after providing as to the subscribers of the memorandum of association, says that "every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

Sect. 38 defines the liability of members in the event of winding-up, and says that "every present and past member of such company shall be liable to contribute to the assets," with certain qualifications, one of which is that "no past member shall be liable to contribute . . . if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up." Another qualification is that "no past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member"; and a third is that "no past member shall be liable to contribute . . . unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

[VAUGHAN WILLIAMS J. That does not help us much as to what happens after the winding-up has commenced. "Past" and "present" refer to the same moment of time—the commencement of the winding-up.]

They refer to the whole winding-up. If the original member is liable, it is difficult to say that his transferee is a member. The term "existing members" refers to all shareholders, whether they held their shares at the commencement of the winding-up or acquired them afterwards; and liability as a B contributory would, in the event of subsequent transfers, be fixed by reference, not to the date of winding-up, but to the date of transfer.

Where a company is being wound up by the Court—that is, under a compulsory order—or under its supervision, s. 153 of the Act of 1862 says that "every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void." The intention was to substitute the liquidator's assent in a voluntary winding-up for that of the Court in other liquidations.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

Reference may also be made to s. 74, which defines "contributory," and to s. 75, which says that the liability of a contributory "shall be deemed to create a debt (in England . . . of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made . . . for enforcing such liability." The contract of Taylor having been novated, the liquidator obtains the transferee's liability for the exact sum in the place of Taylor's liability. The liquidator has power to rectify the register of members by putting the transferee's name on it in the place of that of the transferor (see ss. 98 and 133, clause 8), and by issuing a certificate to a transferee he and the company are estopped from asserting that the original shareholder is a member or a contributory.

The only reported case bearing on the point contains what is but a dictum of Bacon V.-C., that when liquidators "are asked to permit a transfer, which, by the very terms of the Act, cannot take place unless they sanction it, they say, 'Very well, if it is convenient to you, you may transfer. You may get anybody else to undertake to pay what you do owe, or may owe; but we will not let go the hold we have upon you now, and we will only let you transfer on the terms that you will keep us in as good a condition now as we should be if we did not let you transfer'": *Cleve v. Financial Corporation*. (1)

*Bramwell Davis, Q.C.*, and *M. Muir Mackenzie*, for Phillips. The transfer to Phillips was made soon after the winding-up commenced, and with the liquidator's assent. He transferred to Rickards, and Rickards is the only person now liable in respect of the shares. The words "past" and "present" in s. 38 refer to the commencement of the winding-up: *Webb v. Whiffin*. (2) Sect. 38 defines the liabilities of the shareholders: *Burgess's Case*. (3)

[VAUGHAN WILLIAMS J. The liability under s. 38 is different from the liability of membership; it applies to persons who are not members.]

The section says that contribution is to come from both past

(1) L. R. 16 Eq. 363, 381.

(2) L. R. 5 H. L. 711, 725.

(3) 15 Ch. D. 507, 512.



and present members, but present members are to be called on first. The effect of accepting the transfer is that the transferor's liability is gone. Mr. Farwell's client and those in the same class are present members and the only persons liable.

*Farwell, Q.C.*, and *Ingle Joyce*, for Rickards. Rickards and his class are the ultimate transferees. They are not liable. The commencement of the winding-up regulates the liability as between past and present members, and membership is then ascertained: Companies Act, 1862, s. 38; Lindley on Companies, 5th ed. p. 751.

The voluntary liquidator has no power to alter or rectify the register of members: Lindley on Companies, 5th ed. p. 748.

[*Buckley, Q.C.*, referred to *Brighton Arcade Co. v. Dowling*. (1)]

Sect. 133, clause 8, must be compared with s. 98. Under s. 98, after making a winding-up order, the Court on settling a list of contributories has power to rectify the register. Sect. 133, clause 8, says the voluntary liquidator "may exercise the powers hereinbefore given to the Court of settling the list," but it is silent about rectifying the register. Consistently with that provision, s. 131 enables the voluntary liquidator to sanction transfers, but not to allow alteration of status. Alteration of status is absolutely void in a voluntary winding-up, whereas under s. 153, when a compulsory or supervision order has been made, the Court may order that either a transfer or an alteration of status shall not be void. The transferors and transferees may have rights inter se, but the company is outside these. There is no objection to a transfer during winding up; but the transferor still remains a contributory, his liability to the company still remaining: *Rudge v. Bowman* (2); *In re Onward Building Society*. (3)

It would be too dangerous to leave it to a voluntary liquidator to let off registered members at his discretion. His consent to a transfer under s. 131 is a necessary preliminary to an application to the Court for rectification; but it is still for the Court to allow or refuse rectification.

(1) L. R. 3 C. P. 175.

(2) L. R. 3 Q. B. 689, 696.

(3) [1891] 2 Q. B. 463, 475, 479.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS?  
CASE.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

*Sheldon*, for the Metropolitan Bank (of England and Wales), Limited.

*Buckley, Q.C.*, in reply. All the three classes have been rightly placed on the list. Taylor was on the register when the winding-up commenced, and the Court has to see what happened when the tree fell. The sections of the Act then came into effect. Taylor was a member, and s. 38 immediately spoke and fixed his liability as a "present member." Sect. 74 then pointed him out as a "contributory," s. 75 defined the nature of his liability as a contributory, and s. 101 shewed how the liability was to be enforced.

Taylor then transferred to Phillips with the sanction which s. 131 enables the liquidator to give. But the transfer did not free Taylor from liability. He remained a contributory though Phillips' liability was also accepted—of course the more persons there are who are liable, the better for the company. If Taylor's liability was gone his status was altered, for his status was that of a member liable in respect of his shares; but under s. 131 all alterations of status, without exception, are void, although that is not the case as regards transfers.

Merely sanctioning a transfer makes no difference to Taylor's liability to the company. That is consistent with s. 38, which says nothing as to altering the liability of present members.

[VAUGHAN WILLIAMS J. Under s. 153 the Court can allow an alteration of status either after a compulsory order, or where a voluntary winding-up has been continued under supervision. Why should not the same thing be done in a voluntary winding-up without supervision?]

Possibly the Court may order that an alteration of status shall not be void, but the liquidator cannot do it.

Phillips became, as between him and the company, a member of it. The liquidator could not rectify the register; but if he could, merely putting a transfer on it is not rectification. The only power to rectify is under s. 98.

After the transfer by Phillips, he in like manner remained liable; and Rickards, as a transferee, is in no better a position than Phillips. [He also referred to *Emmerson's Case*. (1)]

*Levett, Q.C.* I ask the Court to sanction the alteration of Taylor's status.

*Bramwell Davis, Q.C.* And I ask that Phillips' status may be altered.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

Aug. 7. VAUGHAN WILLIAMS J. (after stating the facts). The question now arises whether all or any and which of these persons are liable to be placed on the list of contributories. It is admitted that the bank went into voluntary liquidation with a view to selling its assets to and amalgamating with the Metropolitan Bank, and that the arrangement has been carried out, and further that, at the time when the resolutions were passed and the agreement was entered into, it was contemplated by all parties that there would be sufficient assets to satisfy all the liabilities of the bank in liquidation. So far as the liquidator is concerned, no one suggests that in anything he did he acted otherwise than in good faith, and for what he honestly considered to be the interests of the bank in liquidation and in accordance with his duty as liquidator. The considerations which might reasonably lead a liquidator to sanction a transfer of shares must vary with the circumstances of each liquidation. If the concern is insolvent, one cannot very easily understand how an honest liquidator in the performance of his duty could sanction a transfer of shares, unless under circumstances which would make it sure that the transferee would be able to contribute to the assets of the company the sum that was due on the shares. So much is this the case that, generally speaking, one would feel that the liquidator would better perform his duty if he kept on the register the person who was there at the commencement of the liquidation, and who was liable as a contributory; because one cannot easily imagine any advantage which would accrue to the company from the transfer in such a case, unless, indeed, the improbable case occurs, as was suggested in *Rudge v. Bowman* (1), of a transfer from a pauper to a rich man. But in the case of a proposed sale and amalgamation of this sort it is obvious that other considerations might reasonably affect the mind of a liquidator

(1) L. R. 3 Q. B. 689, 696.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

who was asked to sanction a transfer. He might very well wish that the whole of the people to be placed on the list of contributories should be persons who acquiesced in and approved of the proposed arrangement. Be that as it may, the first question I have to decide is: Which of these applicants was liable as a contributory at the commencement of the winding-up? That is determined by s. 38 of the Act of 1862. No doubt, in that section the words "past" and "present" have reference to the commencement of the liquidation. At that time it follows that Taylor was liable to be placed on the list of contributories; and it is therefore necessary to inquire whether he has discharged himself from that liability. Before going further, I want to point out that, as I understand s. 38, the liability of a contributory is not exactly the same as or coincident with the liability of a member—a contributory may be called on to pay such sums as may be required to adjust the rights of the contributories amongst themselves, subject to the qualifications mentioned in the section. In order to ascertain whether Taylor has discharged himself of that liability, one must first look at s. 131. That section is not very happily worded, and it is difficult to construe. I think one must read the section in such a way that the word "except" applies to transfers only. There is no doubt that as between a transferor and transferee there is nothing to make void transfers executed after the liquidation has commenced—that has been expressly decided—but they are void as between the member, the contributory, and the company unless they fall within the exception in the section. This particular transfer from Taylor to Phillips does fall within the exception because it was made with the sanction of the liquidator. I should have supposed that the intention of the Legislature was that in the case of a transfer with the liquidator's sanction the transfer should bind the liquidator, because it is impossible to suppose that a transfer with sanction was to be placed on the same footing as one made without sanction. I think, therefore, that to some extent the transfer with sanction must have been intended to bind the liquidator.

It is pointed out, however, that by s. 131 "alteration of



status" is made void without any exception at all. What is intended by that? Is it intended that a transfer with sanction is always to be void so far as it operates as an alteration in the status of a member? I do not think so. It seems to me that the effect of the transfer is that the transferee has a right to be put on the register of members, and that the transferor is entitled to have his name removed from it, and that the liquidator has power to do all that is necessary for that purpose. I think he can rectify the register, if "rectify" is the word. He can deal with the register in such a way as to give effect to that change in membership.

Sect. 133, clause 8, says the voluntary liquidators "may exercise the powers hereinbefore given to the Court of settling the list of contributories," and it is contended that the power thereby given to the liquidator is the power which is given to the Court by s. 98. Sect. 98 says: "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities." I have called attention to those two clauses because I wish to express my view that whatever powers are given to the Court by s. 98 are conferred on the voluntary liquidator by clause 8 of s. 133. But I do not think the power of rectification by the liquidator is applicable here. I agree with Mr. Buckley that this is not rectification—it is really alteration of the register in order to give effect to a transfer sanctioned by the liquidator.

The transfer, then, is effective when sanctioned to the extent that the transferee has a right to go on the register, and the transferor is entitled to come off it. That alone would probably enable the transferee to come in his own name and claim any rights as to distribution of a surplus or adjustment of the rights of members inter se, and then full effect would be given to the words "with the sanction of the liquidator." But, as I have said, I do not think that the rights and liabilities of membership are at all identical with the rights and liabilities, or rights, liabilities, and status of a contributory; and I do not

VAUGHAN  
WILLIAMS  
J.

1896

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TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.  
—

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

think that the sanction of the liquidator necessarily affects the status of the transferor so as to free him from liability as a contributory. If that can be done, it must be done under some other power which is in the Court, and not, in my judgment, by the liquidator alone.

In a compulsory winding-up, or a voluntary winding-up under supervision, s. 153 is the governing section, and it provides that "every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void." Having regard to the fact that s. 153 applies to winding-up under supervision, one ought to be very reluctant to give to s. 131, which applies to voluntary winding-up without supervision, a construction inconsistent with s. 153, which applies to a voluntary winding-up under supervision. I cannot conceive that the rights of parties in a voluntary winding-up should be different from their rights in a voluntary winding-up plus supervision. The methods of remedy may well be different in the two cases; but it is incredible that the Legislature should have intended that rights and liabilities in a voluntary winding-up should be altered because the supervision of the Court has been added. The effect of s. 153 is that when a compulsory or supervision order has been made, the Court has clearly power to order that alteration of status shall not be void.

I am inclined to think, for the reasons I have given, based upon the separation of the words "alteration of status" from the words included in the exception, that a voluntary liquidator cannot sanction an alteration of status; but I cannot believe that, in a voluntary liquidation without supervision, the Legislature intended that there should be no power in the Court to sanction a transfer so as to allow an alteration of the status of the members of the company. If I thought I had not the same power here that I have under s. 153 under a compulsory or supervision order, I should feel compelled to come to the conclusion that the sanction of the liquidator was sufficient; but I do not think so. Of course, the same object might be attained by making a supervision order, and if necessary I will do so.

For the reasons I have stated, I give leave to amend the application.

I am sorry that the purchasing bank, which is the real party interested, has not taken the opportunity of bringing forward any facts going to shew that the alteration of status ought not to be sanctioned. Under the circumstances, I must assume that the liquidator was acting in the interests of the company when he sanctioned these transfers; but, before I make any order allowing an alteration of the status of a member, I must consider what is the position of the other people, and whether I am satisfied that someone is liable in the place of the member. As to that, I have some difficulty. Phillips has become a transferee, but that does not impose upon him any liability at all under s. 38.

Sect. 38 deals with the persons who were present or past members at the commencement of the liquidation, and Mr. Phillips was not then either a present or a past member. Mr. Buckley says that that does not matter, because Phillips is hit under s. 74 or s. 75; but there seems to be nothing in s. 74 imposing liability to calls on a person who has become a transferee after the winding-up, and s. 75 does not seem to carry it any further. I feel, therefore, great difficulty in saying that there is anything in the Act of Parliament which throws liability to contribute on a person who becomes a transferee after the winding-up has commenced.

Then it is said that, although the Act may not do it, it is done by contract, and that there is a novation by which the liquidator agrees to accept the transferee as a specialty debtor, for the sums payable on the shares, in place of the contributory, and that the transferee by novation has become the person liable. But I doubt that very much, and I do not think I ought to draw that inference.

I have invited Mr. Levett's client to amend, so that the whole thing may be ripe for ultimate decision; but I am not prepared at present to alter the status of Taylor, because I do not see my way to fix any one else with liability. I am afraid, therefore, that Taylor must be left to bear the burthen as contributory. I think Phillips is entitled to be taken off the list of

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.

VAUGHAN  
WILLIAMS  
J.

1896

TAYLOR,  
PHILLIPS,  
AND  
RICKARDS'  
CASE.  

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contributories—I say nothing about his liability as a member of the company; and I think Rickards is also entitled to be taken off. But Taylor is, of course, entitled to be indemnified by Phillips, and Phillips is entitled to be indemnified by Rickards. The case is one of very great difficulty, and I shall be very glad if it goes further.

Generally, my conclusion is that the list of contributories must be settled with reference to the moment of time at which the liquidation commences; that the voluntary liquidator can sanction a transfer subsequently made, and can deal with the register so as to give effect to that transfer; that his doing so will give the transferee rights which he would not otherwise have, but that it does not relieve the original contributory from liability to contribute. The liquidator has no power of himself to sanction an alteration of status so as to relieve Taylor from his status as contributory. But I think the Court has this power, but ought not to exercise it unless it is satisfied that someone else is liable. I am not satisfied, because I do not see my way to put either of the transferees on 'the list of contributories. They are on the register of members, and it may well be that the liquidator may have some other rights against them as members of the company.

Solicitors for liquidator: *Riddell, Vaizey & Smith, for Vachell & Co., Cardiff.*

Solicitors for Taylor: *Bower, Cotton & Bower, for T. H. Stephens, Cardiff.*

Solicitors for Phillips: *Few & Co., for Bythway & Son, Pontypool.*

Solicitor for Rickards: *Richard White, for F. Lewis, Newport, Monmouth.*

Solicitors for purchasing bank: *Burton, Yeates & Hart, for Johnson, Barclay, Johnson & Rogers, Birmingham.*

F. E.



*In re* GURNEY.  
CLIFFORD *v.* GURNEY.

[1893 G. 2131.]

KEKEWICH  
J.

1896  
Nov. 11.

*Practice—Leave to sign Judgment—Judgment not signed or entered—Judgment Creditor—Priority—Rules of Supreme Court, 1883, Order XIV., r. 1; Order XLI., rr. 3, 4.*

An order under Order XIV., r. 1, giving liberty to sign final judgment for the amount claimed by the writ of summons, is not equivalent to signing or entry of judgment, so as to give a judgment creditor's right of priority to a plaintiff who has failed to follow up the order by signing judgment under Order XLI.

ADJOURNED SUMMONS.

On October 13, 1892, the Bouillon Fleet, Limited, mineral water manufacturers, took out a writ of summons, specially indorsed, under Order III., r. 6, in the Queen's Bench Division, against the administratrix of Edwin Gurney, who had died insolvent, for a debt of 135*l.* and interest. The defendant appeared to the writ, and on October 31, 1892, an order was made in her presence by the master giving, in the usual form, the plaintiffs liberty to sign final judgment for the amount claimed. That order, however, was never followed up by actual signing or entry of judgment.

In 1893 the present creditor's action was brought against the administratrix for the administration of the estate of the deceased; and on November 13, 1893, an administration judgment was pronounced directing the usual accounts and inquiries. Under that judgment the chief clerk, by his certificate, dated July 31, 1896, allowed various debts, including those of the present plaintiff and of the Bouillon Fleet, Limited, and certified that the debt of the company was entitled to priority by virtue of the master's order of October 31, 1892. Thereupon the plaintiff in the administration action took out the present summons to vary the chief clerk's certificate by striking out the finding as to the priority of the company, and substituting therefor a finding that they were only entitled to rank *pari passu* with the other creditors.

KEKEWICH J.  
1896  
*In re*  
GURNEY.  
CLIFFORD  
v.  
GURNEY.  
—

*Micklem*, for the applicant. The chief clerk's finding is wrong. He proceeded under rule 3 of Order XLI.; whereas the case comes under rule 4, which provides that the judgment shall take effect from the date of entry, and the judgment in the present case has never been entered at all, and therefore has not been filed as required by rule 15 of the Practice Masters' Rules: Annual Practice, 1897, p. 1229.

Liberty to sign judgment is not judgment, nor is it equivalent to judgment. A creditor of an insolvent testator cannot obtain priority over other creditors unless, before the judgment in an administration action, he actually obtains judgment for his debt: *In re Maggi*. (1)

I submit, therefore, that the master's order was not a judgment, and that as this creditor has not gone on to sign judgment, he has no priority.

*Dunham*, for the company. I do not say that this is a judgment, but it is substantially the same thing. There has been a final adjudication of this creditor's claim, and this adjudication was made in the defendant's presence. The defendant had then been heard for the last time, and nothing more remained to be done to which she could take exception. What remained to be done was purely formal, signing judgment by the plaintiff being as formal a matter as issuing execution. In the Chancery Division the practice under Order XIV. is not to make an intermediate order, but to give judgment for an immediate order for payment; while the practice in the Queen's Bench Division is to make an intermediate order giving leave to sign judgment; but the intention in both Divisions is that the same result shall follow.

KEKEWICH J. In my opinion the chief clerk was in error. Liberty to sign judgment cannot, according to the ordinary rules of the English language, be equivalent to the actual signing of judgment, or to judgment. It is giving leave to do something which may or may not be done. So much for the verbal construction of the order. Then, as a matter of practice, it is clear that the order of a master or a judge giving

liberty to sign judgment does not itself operate as a judgment. KEKEWICH  
A subsequent order is required, and that is the judgment. J.  
Therefore, in my opinion, the certificate is wrong, and the 1896  
applicant is entitled to an order as asked by the summons; ~~~~~  
and the creditor who persuaded the chief clerk to decide *In re*  
otherwise must pay the costs of this application. GURNEY.  
CLIFFORD  
v.  
GURNEY.

Solicitors : *Pearce-Jones & Co. ; C. P. Pritchard.*

G. I. F. C.

C. A.

1896

July 24, 25;  
Nov. 6.

## PITT PITTS v. GEORGE &amp; CO.

[1896 P. 473.]

*Copyright—British International Copyright—Importation into Great Britain of Copies printed where the Book was first published—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 11, 13, 15, 17—International Copyright Act, 1844 (7 & 8 Vict. c. 12), ss. 2, 3, 10. (1)*

The plaintiff was owner of the British international copyright of a book first published in Germany. The defendant imported and sold in Great Britain copies printed in Germany by the owner of the German copyright:—

*Held*, by Lindley and Rigby L.JJ. (dissentiente Lopes L.J.), reversing the decision of Kekewich J., that the plaintiff was entitled to restrain this importation and sale, for that s. 10 of the International Copyright Act, which, as regards any book in which there is British international copyright, prohibits the importation into Great Britain, without the consent of the proprietor of such copyright, of copies printed in any foreign country except that in which the book was first published, does not form a complete code as to the importation of copies; and that s. 3, which provides that the enactments in the Copyright Act shall apply to books in which there is British international copyright in the same way as if such books had been first published here, made ss. 15 and 17 of the Copyright Act applicable to the book in question, and that as under those sections the owner of the copyright could, if the book had been first published in Great Britain, have restrained the importation of these copies, the owner of the British international copyright could do so.

THIS was an appeal by the plaintiff from a refusal of Kekewich J. to grant an injunction restraining the importation by

(1) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 15: "If any person shall, in any part of the British dominions, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose

to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed: Provided always, that in Scotland such offender shall be liable to an action in the



the defendant for sale in this country of copies of a piece of music lawfully printed in Leipzig, where the original publica-

C. A.

1896

PITT PITTS  
v.  
GEORGE & Co.

Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there."

Sect. 17: "After the passing of this Act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book, into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of 10*l.*, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or

let to hire, or shall cause to be sold, published, or exposed to sale or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this Act, 5*l.* to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book."

The International Copyright Act, 1844 (7 & 8 Vict. c. 12). This statute, after reciting the former International Copyright Act, and the Copyright Act, 1842, and several statutes as to dramatic literary property and works of art, proceeds: "And whereas the powers vested in Her Majesty by the said International Copyright Act are insufficient to enable Her Majesty to confer upon authors of books first published in foreign countries copyright of the like duration, and with the like remedies for the infringement thereof, which are conferred and provided by the said Copyright Amendment Act with respect to authors of books first published in the British dominions, And the said International Copyright Act does not empower Her Majesty to confer any exclusive right of representing or performing dramatic pieces or musical compositions first published in foreign countries upon the authors thereof, nor to extend the privilege of copyright to prints and sculpture first published abroad; and it is expedient to vest increased powers in Her Majesty in this respect, and for that purpose to repeal the said International Copyright Act, and to give such other powers to Her Majesty, and to make such further provisions, as are hereinafter contained, Be it therefore enacted" Then by s. 1 the former International Copyright Act was there

C. A.

1896

PITT PITTS

v.

GEORGE &amp; Co.

tion took place, the plaintiff having the British international copyright, and the copies being printed by the person having the German copyright.

F. Ries, of Dresden, and afterwards of Berlin, who was entitled to the copyright in a musical composition by Joachim

repealed. By s. 2 Her Majesty was empowered by Order in Council to confer upon the authors of books first published in foreign countries copyright in this country.

Sect. 3: "In case any such order shall apply to books, all and singular the enactments of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom, save and except such of the said enactments, or such parts thereof, as shall be excepted in such order, and save and except such of the said enactments as relate to the delivery of copies of books at the British Museum, and to or for the use of the other libraries mentioned in the said Copyright Amendment Act."

Sect. 10: "All copies of books wherein there shall be any subsisting copyright under or by virtue of this Act, or of any Order in Council made in pursuance thereof, printed or reprinted in any foreign country except that in which such books were first published, shall be and the same are hereby absolutely prohibited to be

imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing, and if imported contrary to this prohibition the same and the importers thereof shall be subject to the enactments in force relating to goods prohibited to be imported by any Act relating to the customs; and as respects any such copies so prohibited to be imported, and also as respects any copies unlawfully printed in any place whatsoever of any books wherein there shall be any such subsisting copyright as aforesaid, any person who shall in any part of the British dominions import such prohibited or unlawfully printed copies, or who, knowing such copies to be so unlawfully imported or unlawfully printed, shall sell, publish, or expose to sale or hire, or shall cause to be sold, published, or exposed to sale or hire, or have in his possession for sale or hire, any such copies so unlawfully imported or unlawfully printed, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought and prosecuted in the same courts and in the same manner, and with the like restrictions upon the proceedings of the defendant, as are respectively prescribed in the said Copyright Amendment Act with relation to actions thereby authorized to be brought by proprietors of copyright against persons importing or selling books unlawfully printed in the British dominions."

Raff, called "La Fileuse," first published at Leipzig, sold to Patey & Willis of London "all my copyright and interest, present and future, vested and contingent or otherwise, in England and Colonies, together with the right of performing the same, of and in" certain pianoforte pieces, which included "La Fileuse." No formal assignment was made; but a receipt was given by which Ries undertook to execute such further assurance as might be required. The work was entered and registered at Stationers' Hall as copyright in the name of Patey & Willis. The plaintiff had since taken over the business of Patey & Willis, and continued it under the same name.

C. A.  
1896  
PITT PITTS  
v.  
GEORGE & Co.

The defendant, who was carrying on business under the style of Edward George & Co., sold in England divers copies of "La Fileuse," which had been printed in Leipzig by the successors of Ries. The plaintiff brought this action for an injunction and damages.

Kekewich J. held that the pieces of music, being lawfully printed in the domicil of origin, were not within the prohibitive part of s. 10 of the International Copyright Act, 1844, nor within the prohibition of s. 15 of the Copyright Act, 1842. His Lordship, therefore (the motion for an injunction being by consent treated as the trial), dismissed the action with costs. The plaintiff appealed. The appeal was heard on July 24, 25, 1896.

*Cozens-Hardy, Q.C.*, and *Ingpen*, for the appellant. By s. 2 of the International Copyright Act, 1844 (7 & 8 Vict. c. 12), power is given to Her Majesty by Order in Council to give copyright in this country to books first published abroad; and s. 3 provides that if any such order shall apply to books, all the enactments in 5 & 6 Vict. c. 45 (the Copyright Act, 1842), shall apply to books to which the order extends in the same manner as if such books had been first published in the United Kingdom. Sects. 15 and 17 of the Copyright Act must therefore be applied. Sect. 15 prohibits the importation for sale or hire of any book unlawfully printed from parts beyond the sea, and "unlawfully printed" must, when applied to a book printed abroad, mean printed without the consent of the owner of the

C. A. British copyright. Sect. 17 prohibits the importation of books first published here and reprinted abroad. This, bearing in mind s. 3 of the Act of 1844, prohibits the importation from abroad of any books in which there is a British international copyright. The question is whether these privileges are cut down by s. 10, which forbids the importation of books in which there is a British international copyright, except books printed in the country in which they were originally published. If it had been intended by this section to lessen the advantages given by the previous sections it would have been worded very differently. It is loosely framed, and omits to provide for the case of the copyright abroad belonging to one person and the copyright here to another. If the decision of the Court below is upheld, the object of the International Copyright Act, as expressed in its recitals—to enable Her Majesty to confer upon authors of books first published abroad the same rights as are given by the Copyright Act to the authors of books first published in the British dominions—will be defeated, and a British international copyright in a book first published abroad will have no marketable value here, since books may be imported without limit by any one from the country in which it was first published.

*Scrutton*, for the respondent. On the true construction of the International Copyright Act, 1844, the 10th section of that Act is intended to form a complete code as to the importation from abroad of books in which there is a British international copyright, and it clearly allows the importation of copies printed in the country where the book was first published. This is a clear enactment, and is not to be controlled by an uncertain inference from s. 3, which it is contended imports ss. 15 and 17 of the Copyright Act, 1842. Sect. 15 deals only with the importation of books unlawfully printed within the British dominions, and cannot without great violence be construed to be applied to the importation of books printed abroad. If s. 15 is made by the International Act to relate to books published abroad, there is no occasion for s. 17, which expressly relates to them. There is nothing in s. 3 so inconsistent with s. 10 as to render the exception in the latter section



inoperative. The two sections may be read together, s. 3 relating to foreign countries other than that in which the book was first published, and s. 10 excepting that country.

*Cozens-Hardy, Q.C.*, in reply.

C.A.

1896

PITT PITTS

v.

GEORGE &amp; Co.

*Cur. adv. vult.*

Nov. 6. LINDLEY L.J. The plaintiff is the assignee of the English copyright in a German piece of music published at Leipzig; and he seeks to restrain the defendant from importing into this country for sale here copies of the piece of music lawfully printed in Leipzig, and sold to the defendant in Brussels.

The title of the plaintiff is admitted; and it is conceded that, although he has not registered his assignment, that circumstance is immaterial, having regard to the International Copyright Act, 1886, and to the decision in *Hanfstaengl v. American Tobacco Co.* (1) It is further conceded that the question turns on the statutes relating to copyright in books, and not on the statutes relating to the performance of musical compositions or dramatic pieces.

Kekewich J. decided that the defendant was not infringing the plaintiff's rights; and from that decision the plaintiff has appealed.

The case turns on the true construction of ss. 2, 11, 13, 15, and 17 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), and of ss. 2, 3, and 10 of the International Copyright Act, 1844 (7 & 8 Vict. c. 12).

The Copyright Act of 1842 (5 & 6 Vict. c. 45) has no reference to copyright in foreign works under any International Copyright Act. It contains, however, two sections for the protection of copyright in other books—namely, ss. 15 and 17. Sect. 15 gives a remedy by action on the case for—(1.) Printing in any part of the British dominions for sale or exportation any book in which there is copyright, without the consent in writing of the proprietor of the copyright. (2.) Importing for sale or hire any such book so unlawfully printed. (3.) Selling, publishing, or exposing for sale or hire any such book known to

(1) [1895] 1 Q. B. 347.

C. A.  
 1896  
 ~~~~~  
 PITT PITTS
 v.
 GEORGE & Co.
 ~~~~~  
 Lindley L.J.

have been so unlawfully printed or imported. (4.) Possessing for sale or hire any such book known to have been so unlawfully printed or imported. The section is so worded as apparently not to hit the importation of copies printed in foreign countries. This result is due to the use of the expressions "such book" and "so having been unlawfully printed," which occur after the clause which prohibits printing. I understand these expressions to mean as follows: "Such book" means any book in which there is copyright under the Act. "So having been unlawfully printed" means printed in any part of the British dominions without the written consent of the proprietor of the copyright.

Sect. 17, however, goes further as regards the importation of printed books first composed or written or printed and published in the United Kingdom. If there is copyright in such books, the importation of copies into any part of the British dominions for sale or hire, except by the proprietor of the copyright or by some one authorized by him, is absolutely prohibited wherever such copies may be printed, and all such copies may be seized and destroyed by the officers of customs or excise. Penalties, moreover, are inflicted on the importers, and on persons who sell, publish, expose for sale, or let for hire copies known by them to have been unlawfully imported. This section, however, is confined entirely to printed books first composed or written or printed and published in the United Kingdom. It does not apply to other books.

Neither of these sections prohibits importation for private use, but only importation for sale or hire; neither of them, moreover, is framed with a view to protect copyright in books first published in foreign countries; nor would the language of these sections be applicable to such books unless made so by some other statute. Neither of these sections, moreover, alludes to any remedy by way of injunction. But, having regard to well-settled principles of Courts of Equity, there can be no doubt that an injunction would be granted to protect the owner of copyright conferred by the Act and to restrain an infringement under either section.

I pass now to the International Copyright Act, 1844 (7 & 8 Vict. c. 12). This statute replaced an earlier International

Copyright Act of 1838 (1 & 2 Vict. c. 59), which was found insufficient for the purpose of enabling the Crown to confer on the authors of works first published in foreign countries copyright to the same extent and with the same remedies for infringement as the authors of works first published in this country enjoyed under our own Copyright Acts. The preamble of the Act of 1844 alludes to this defect, and its main object is to remedy it. Accordingly, s. 2 enables the Crown to confer on the authors of books first published in foreign countries the privilege of copyright therein; and s. 3 enacts that persons on whom such privilege is conferred shall be entitled to the benefit of the Act 5 & 6 Vict. c. 45, in the same manner as if such books had been first published in the United Kingdom. The language of this section is very important. It enacts "that in case any such order" (i.e., Order in Council) "shall apply to books, all and singular the enactments of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom," subject to certain exceptions which are not material.

This section, unless controlled by s. 10, requires the Court, in effect, and so far as possible, to apply ss. 15 and 17 of 5 & 6 Vict. c. 45, to books first published in foreign countries. But before attempting to do this it is necessary to consider s. 10 of the Act of 1844, and to ascertain to what extent, if at all, it modifies s. 3 or excludes the application of the ss. 15 and 17 of the Act of 5 & 6 Vict. c. 45. Sect. 10 enacts: [His Lordship read the section.] It will be observed that this section expressly excepts from its operation the importation of copies made in the country in which the copyright book was first published. This exception is quite new, and the reason for it is not stated. Moreover, the express prohibition against importation does not

C. A.  
1896  
PITT PITTS  
v.  
GEORGE & Co.  
Lindley L.J.

C. A.  
 1896  
 PITT PITTS  
 v.  
 GEORGE & CO.  
 Lindley L.J.

extend to copies printed in any of the British dominions. Such copies are, however, included in the second part of the section, which gives a remedy by action in respect of the importation of books unlawfully printed anywhere. The consequence appears to be that the Customs House officers cannot under s. 10 seize any copies of a foreign book in which there is copyright under the Act of 1844, unless such copies have been printed in some foreign country other than that in which the book was first printed. Copies printed in that country or in any part of the British dominions cannot be so seized under the section in question. The reason for this is difficult to discover. The power of seizing copies wrongfully imported for sale or hire under s. 17 of the 5 & 6 Vict. c. 45, extends to copies printed anywhere abroad. Again, in framing s. 10 the Legislature in prohibiting importation has drawn no distinction between importation for sale or hire and importation for other purposes. The distinction drawn is between importation with the consent of the proprietor of the copyright and importation without such consent. This was, no doubt, deemed an improvement. But why s. 10 was framed as it is, and why, if intended to qualify and cut down the effect of s. 3, those two sections should be left as they are, I confess I am unable to discover. But, however difficult it may be to account for the language in which s. 10 is expressed, it is not difficult to interpret that language as it stands. Reading it in its plain literal sense, the present case is expressly excepted from the operation of the section, for the importation complained of is of copies not only printed but also lawfully printed in the country in which the copyright work was first published. So that the present case is not covered either by the first part of the section, which prohibits importation, nor by the second part, which gives a remedy by action.

We are thus thrown back on ss. 15 and 17 of 5 & 6 Vict. c. 45, with a direction (see s. 3 of the Act of 1844) to apply them to a case to which their language is apparently inapplicable, and with a statement (see the preamble) that the object is to confer on the owners of copyright in foreign works greater rights than could have been conferred upon them under the earlier International Copyright Act and similar in all respects



to those enjoyed by British authors. The work here in question must be deemed to have been first published in this country; and the plaintiff must be treated as if he were the owner of the copyright in this country in such work. Sect. 3 of the Act of 1844 clearly requires these assumptions to be made. Sect. 3 does not say first printed and published; but I do not attach importance to this verbal criticism. To attribute importance to it would nullify s. 3. I take "published" in s. 3 to include printing for publication. These assumptions appear to me necessarily to involve as consequences that the expressions "such book" and "so having been unlawfully printed," which occur in ss. 15 and 17 of 5 & 6 Vict. c. 45, must be applied to the work the copyright in which belongs to the plaintiff. I have already pointed out that this could hardly be their meaning in the statute 5 & 6 Vict. c. 45. Even if s. 15 cannot be held to apply, owing to its language being restricted to printing in the British dominions, s. 17 can, for, as already pointed out, its scope is wider. To hold that neither section applies is to hold that s. 3 of the Act of 1844 is absolutely nugatory, and in obedience to this section the difficulties in applying ss. 15 and 17 of 5 & 6 Vict. c. 45, to this case must be got over. The alternative is to hold that the plaintiff has no remedy for a manifest injury, and that Parliament failed in 1844 to give effect to its declared intention. Mr. Scrutton in his very able argument almost persuaded me that this was so. His contention was that s. 10 was intended to be a code containing a complete enumeration of the remedies available for an infringement of copyright in foreign works, and that it was inconsistent with ss. 15 & 17 of 5 & 6 Vict. c. 45, if applied to such copyright. I confess I was much struck with this contention. But I cannot adopt it. Sect. 10 is certainly not a complete code, for in the face of s. 3 it cannot be regarded as impliedly depriving the proprietors of copyright under the Act of 1844 of any of the rights which that section and the statute there referred to confer upon them. The truth is that when closely examined s. 10 will be found not to cover the whole ground covered by s. 3 and the incorporated ss. 15 and 17 of 5 & 6 Vict. c. 45.

C. A.

1896

PITT PITTS  
v.  
GEORGE & Co.  
Lindley L.J.

C. A.  
1896  
PITT PITTS  
v.  
GEORGE & Co.  
Lindley L.J.

What, then, is the true inference from the express exception in s. 10? Is it to be inferred that the foreigner entitled to copyright in this country is liable to have that copyright infringed by any importer of books printed in his own country, or is the inference to be that as regards such books he is entitled to the same protection as a British author would have under the Act of 1842? The latter inference is most in accordance with legal principles and good sense, and is the only inference which is consistent with the preamble and s. 3 of the Act of 1844. If the defendant's contention were correct, it would follow that a foreign author could assign his English copyright and import and sell copies of his work here in competition with his own assignee unless prevented from so doing by express agreement. Such a state of our law would not be very creditable, and I am glad to find that the Court is not driven to hold the law to be so unsatisfactory, nor to hold that, owing to a blunder in drafting, the Legislature has conspicuously failed to attain its declared and manifest object.

One other point was urged which requires notice. The defendant is the purchaser of the books he has imported, and it is contended that he has a right to dispose of those books as he likes without any interference from the owner of the foreign copyright or from the plaintiff, who claims under him. The right, however, of the defendant to use in this country the books which he bought abroad depends on the law of this country, and not on the law of the place of sale. The copyright in this country confers upon the plaintiff rights here which no contract of sale abroad by other persons can deprive him of. Even if the defendant had bought his copies direct from the proprietor of the foreign copyright, the defendant would be in no better position as against the plaintiff than such proprietor himself; and for reasons already given he could not justify what the defendant claims the right to do. The appeal must be allowed with costs here and below. An injunction must be granted to restrain future importations for sale or hire without the consent of the plaintiff, and there must be an inquiry as to the damages sustained by the plaintiff by reaso

of the importation for sale or hire of such copies before the date of this judgment.

C. A.

1896

PITT PITTS

v.

GEORGE &amp; Co.

LOPES L.J. It is with great diffidence that I differ from my brothers in this case, who are much more familiar than I am with these Copyright Acts; but after careful consideration I have arrived at the same conclusion as Kekewich J. in the Court below. The piece of music in question was first published in Leipzig, and the plaintiff is the assignee of the English copyright in this German piece of music. Copies of the piece of music printed in Leipzig and sold to the defendant in Brussels have been imported into this country for sale here. The plaintiff seeks to restrain the defendant from such importation. Whether he can do so depends on certain provisions in the Copyright Acts, which are by no means clear. Sects. 15 and 17 of 5 & 6 Vict. c. 45, have been relied on. I cannot discover how the prohibition contained in s. 15 can apply to the importation of books printed in foreign countries in which an English author has no copyright. This section applies to the British dominions only. Nor can I see how s. 17 applies to a case like the present. It is directed against the importation of foreign copies of copyright works first composed or written or printed in the United Kingdom. This piece of music was first published in a foreign country—namely, in Germany. We must now look at 7 & 8 Vict. c. 12, and the important section is s. 10. This section deals with copies of books (books by the interpretation section including sheets of music) wherein there shall be any copyright subsisting under this Act or any Order in Council made in pursuance thereof, but printed or reprinted in any foreign country. If there was nothing more, this section would cover the present case; but there occur in the section these important words: “in any foreign country except that in which such books were first published.” I am unable to disregard this exception, which, in my judgment, was inserted to meet a case like the present. It is said that this exception is to be disregarded because s. 3 of the same Act says that, in case any such order (i.e., an Order in Council) shall apply to books all and singular the enactments of the said Copyright

C. A.  
 1896  
 PITT PITTS  
 v.  
 GEORGE & Co.  
 ———  
 Lopes L.J.  
 ———

Act (i.e., 5 & 6 Vict. c. 45), and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom, &c. The question is whether anything in the section is so repugnant to the exception contained in s. 10 as to render it inoperative. I think they may be read together, s. 3 dealing with foreign countries not being countries where such books were first published, and s. 10 excepting countries where the books were first published. It is said this imposes a great hardship on the plaintiff and assignees circumstanced in the same way as the plaintiff. That may be so; but we have to construe the Acts of Parliament, and the plaintiff might have protected himself by an express covenant. The appeal, in my opinion, should be dismissed with costs.

RIGBY L.J. This case was argued only on the construction of the two Acts of 1842 and 1844 as modified with reference to registration by s. 4 of the Act of 1886. It seems necessary, however, to refer to other Acts for the purpose of arriving at a clear view of the whole scheme of copyright law at any given time. The material sections of the Acts are singularly involved in their provisions, owing, no doubt, partly to the difficulty of getting through Parliament any bill extending the rights of authors, and partly to the fact that provisions for the protection of copyright were confused with provisions for the protection of revenue, as will hereafter appear.

The Copyright Act of 1842 (5 & 6 Vict. c. 45), whether by s. 15 or by s. 17, provides only against importation for sale or hire. A book lawfully printed abroad might, so far as this Act was concerned, be lawfully imported by the owner of it for his own private use though not for sale or hire.

The statute of 1709 (8 Anne, c. 19) gave copyright only in



Great Britain, and made no distinction between copies imported for sale and other copies imported. Sect. 7 of the Act, however, provided that nothing in the Act should prevent the importation of books in any foreign language printed beyond the seas. The distinction between importations for sale and other importations was introduced in 1735 (as I think for the first time) into an Act for the protection of copyright in engravings (8 Geo. 2, c. 13); but the Act which seems to have afforded the basis for s. 17 of the Act of 1842 is an Act of 1739 (12 Geo. 2, c. 36). This was not a copyright statute at all, but a revenue Act, founded on the consideration that the duty on paper imported for printing books exceeded the duty on printed books. The statute was not required for the protection of copyright in books, which was fully effectuated as to importations by the statute of 1709. The prohibition extended to books in which there was no copyright, if only there had been a printing of them within twenty years. The printing was in that Act the very thing aimed at, whilst in copyright Acts the protection of the owner of the copyright is the important point.

The title to copyright depends generally, not upon first composition or first printing, but upon first publication in the United Kingdom.

The International Copyright Act of 1838 (1 & 2 Vict. c. 59), repealed by the Act of 1844, by s. 1 empowered Her Majesty by Order in Council to direct that the authors of books to be published in any foreign country, or their executors, administrators, and assigns, should have the sole liberty of printing and reprinting such books within the United Kingdom and every other part of the British dominions. Sect. 8 enacted that if any person in the United Kingdom or any other part of the British dominions should print, reprint, or import for sale any book to which the Order in Council should extend, without the consent of the author or other proprietor of the copyright first had and obtained in writing, every offender should be liable to a special action on the case at the suit of the author or other proprietor of the copyright.

It is manifest that the copyright here spoken of is the British international copyright, and it is to be observed that importations

C. A.

1896

PITT PITTs

v.

GEORGE &amp; Co.

Rigby L.J.

C. A.  
 1896  
 ~~~~~  
 PITT PITTS
 v.
 GEORGE & Co.
 ~~~~~  
 Rigby L.J.  
 ———

from foreign countries are prohibited, and that no exception is made of books imported from the foreign country where they were first published. On the other hand, the importation of books otherwise than for sale, as, for instance, for hire or for the private use of the importer, was not struck at.

The Copyright Act of 1842 (5 & 6 Vict. c. 45), like the Act of 1838, extended the copyright to the whole of the British dominions. Sect. 15 of the Act is in *pari materiâ* with s. 8 of the Act of 1838. Its operation as to imports is extended by adding to the words "for sale" the words "or hire"; but as to the importations which it is aimed against, we should expect to find them to be the same in both sections; and I have been unable to see any reason why there should be any difference in this respect between the two sections. Sect. 17 of the Act, as before suggested, and as a comparison of the wording shews, is evidently based on the Act of 1739 adding to the words "for sale" the words "or hire." Probably in both sections the words "or hire" are introduced because of the development of the circulating library system.

Comparing, therefore, the Act of 1838 with that of 1842, the first-named Act authorized at least the same amount of protection from imported books to be given to copyright under that Act as was given to copyright for books first published in the United Kingdom by the later Act, except that importation for hire was not dealt with by it. Neither Act prevented the importation from foreign countries of books for the private use of the importer. It is, however, material to note that by an Act to amend the laws relating to the Customs (5 & 6 Vict. c. 47), which came into operation a few days after the Copyright Act, and must have been before Parliament whilst the last-mentioned Act was under consideration, after a recital in s. 23 that great abuse had prevailed with respect to the introduction into this country for private use of works reprinted abroad, to the great injury of the authors thereof and of others, it was by s. 24 enacted that from and after April 1, 1843, all books wherein the copyright should be subsisting first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, should be and the

same were thereby absolutely prohibited to be imported into the United Kingdom. It seems, therefore, that there was no substantial departure as to importations from the policy of the Act of 1709. We have, then, to approach the consideration of the International Copyright Act of 1844 with the knowledge that provision was made against importation for sale or hire in the Copyright Act of 1842, and for absolute prohibition of importation even for private use in the later Act of the same session, whilst the International Copyright Act of 1838 was clearly imperfect in both respects. We should expect, therefore, that adequate, though not necessarily identical, provisions would be contained in the Act of 1844 with reference to both subjects; and, in my judgment, such provision is made accordingly as to books imported for sale or hire by s. 3, and as to books absolutely prohibited by s. 10. Sect. 10 of the Act of 1844 is, in my judgment, intended to take the place of s. 24 of the Customs Act of 1842 (5 & 6 Vict. c. 47), which is not incorporated in the Act of 1844, clearly because that 24th section was not thought suitable for the purposes of international copyright. Its effect is to prohibit absolutely the importation, without the consent of the registered proprietor of the British international copyright, of books wherein there shall be subsisting copyright under the Act, from any foreign country (with the important exception of books lawfully printed in the country in which the book was first published) into any part of the British dominions. The reason why in this section the exception is made of importations from the country of origin is by no means clear; but it is important to observe that the exception is made from a clause absolutely prohibiting importation, and it may have been thought undesirable to go so far as to prohibit importations for private use from the country of origin, where many persons might be expected to purchase the books honestly and fairly for private use.

I proceed to deal with the suggested interpretation of the Act of 1844, which would make s. 10 a complete code as to importations, and exclude altogether the operation of ss. 15 and 17 of the Act of 1842. If s. 10 contains the whole law on the subject, it is obvious that the proprietor of copyright under the later

C. A.

1896

PITT PITTS  
v.  
GEORGE & Co.  
Rigby L.J.

C. A.  
1896  
PITT PITTS  
v.  
GEORGE & Co.  
Rigby L.J.

Act (supposing him for the moment to be a different person from the owner of the copyright in the country where the book was first published) would be in so much worse a position than the owner of copyright in a book first published in the United Kingdom, that the two rights would be essentially different. Take, for instance, the case before us of a book first published in Germany. The proprietor of copyright in the British dominions would, indeed, have as to all countries but Germany the right of preventing the importation for private use in more sweeping terms than those contained in s. 24 of the Act 5 & 6 Vict. c. 47. But in exchange for this comparatively unimportant advantage he would have to submit to an unlimited importation of books lawfully printed in any part of Germany itself, the country in which it would be most likely that the book would be printed on a large scale. The very person through whom he derived title might, so far as the copyright law is concerned, import and sell as many of the books as he could find a market for, or set up circulating libraries like Mudie's for the diffusion throughout Her Majesty's dominions of the very books as to which he had parted with copyright in those dominions. What he could do, any other person could do who got hold of books lawfully printed in Germany.

Under conditions of trade favourable to books printed in Germany the copyright in the British dominions under the Act would be absolutely worthless, and the beneficial object of the Act of 1844 entirely frustrated.

This consideration affords, in my judgment, a very strong presumption against the suggested construction which would make s. 10 of the Act of 1844 an entire code with reference to importations from abroad. It is, however, said that by appropriate covenants with the owner of the original copyright the assignee may be protected. The suggestion, of course, involves the assumption that the copyright law itself has altogether failed to afford adequate protection. But the possibility of actual protection being given by covenants is by no means clear. The British Legislature is supposed to say to every person everywhere, "You may import for any purpose the books to which our British international copyright extends, if only you go to



Germany for them and see that they are lawfully printed there." The proprietor of the original copyright might, indeed, covenant not himself to introduce into the British dominions any of the books, but how can he effectually provide against the acts of other persons? He might enter into a warranty that no other person should import books from Germany so as to render himself liable to any damages that might be proved to arise. But the actual importation he would be for the most part unable to prevent.

It is by no means certain that in every country to which an Order in Council may extend there must be any law preventing printing for exportation of copyright books. There is no evidence of any such law in Germany.

It is unnecessary, however, in my judgment further to consider the construction of the Act on the assumption that it is left open to us to construe it in this manner if we please. The preamble of the Act makes it plain that the repeal of the Act of 1838 was intended, not for the purpose of limiting, but of increasing, the powers of Her Majesty as to remedies for infringement of copyright, and to make them as effectual as those given by the existing law for the protection of home copyright. This, in my judgment, is sufficient to make it incumbent on the Courts to construe the Act, if it can reasonably be done, so as to avoid the great injury to proprietors of copyright above pointed out. Sect. 3 of the Act, in what seems to me quite clear and unambiguous language, provides that all and singular the enactments of the Act of 1842 (including, of course, ss. 15 and 17, unless their language is clearly inapplicable) "shall . . . . apply to . . . . the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom."

Registration is now rendered unnecessary by the Act of 1886, and the exceptions in s. 3 are for the present purpose irrelevant, though it may be observed that the power reserved to Her Majesty by Order in Council to make exceptions would, if it were found necessary, suffice to obviate any inconvenience arising from the very sweeping terms in which the enactments

C. A.  
1896  
PITT PITTS  
v.  
GEORGE & Co.  
Rigby L.J.

C. A.  
 1896  
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 PITT PITTS
 v.
 GEORGE & CO.

 Rigby L.J.

of the Copyright Act of 1842 are applied to and in effect made part of the Act of 1844. Assuming them to be so applied, the only question remaining is whether they or one of them govern the present case.

I wish to do full justice to Mr. Scrutton's able arguments, which for a time went far towards convincing me that s. 15 of the Act of 1842 deals only with books unlawfully printed within the British dominions. One point relied upon by him was that if s. 15 applied to books printed outside the British dominions there would be no need for s. 17. But s. 17 gives remedies altogether different from the action by the proprietor of the copyright given by s. 15. It may well be that the remedies were to be cumulative in the cases where the two sections overlap, and, if so, the argument that they should be construed so as not to overlap fails. Then Mr. Scrutton said that the literal interpretation of s. 15 is in favour of the construction which would confine its operation to books printed within the British dominions. The result would be that the Act gives no action for damages to the proprietor of copyright in case of books imported from foreign countries; and this is a conclusion not to be arrived at without something approaching necessity.

There may be some foundation for saying that as a matter of strict grammar and on a rigidly literal interpretation of the words of the section which precede the phrase "so having been unlawfully printed," the unlawfulness is made to depend upon the place of printing as well as on the want of consent of the proprietor, with the result that so far as that part of the section is concerned the phrase would not be satisfied without reading into it both elements of unlawfulness. But the section is to be read and interpreted as one entire section; and as we proceed we find reasons for declining to limit the section in the way proposed. And, first, we may ask, what is the meaning of speaking of importation into any place in Her Majesty's dominions from parts beyond the sea? In the Act of 1709 the expression "beyond the seas" clearly refers to all places, foreign countries included, not within the United Kingdom; and I think the natural meaning of the words "parts beyond

the sea " in s. 15 of the Act of 1842 includes foreign countries generally. The phrase may not be strictly accurate; but in the sense which I attribute to it it is very intelligible. It would be strange, indeed, if the phrase were to be construed literally as not referring to importations by land, and still stranger if that literal interpretation were further limited by confining the words to transfers between one part of Her Majesty's dominions and another. What conceivable reason can we suppose the Legislature to have had for distinguishing a transfer between New Zealand and Australia from a transfer between one Australian colony and another; or, what may be a more striking case, a transfer between England and Ireland from a transfer between England and Scotland or Wales?

Secondly, as we go on in the section an offence is made to depend upon "knowing such book" (i.e., a book in which there shall be subsisting copyright) "to have been so unlawfully printed or imported," and lower down we find the words "so unlawfully printed or imported without such consent as aforesaid." Twice over, therefore, in the section we have the word "imported" separated by the disjunctive "or" from the words "so unlawfully printed"; and it seems to me almost impossible to treat the word "imported" in those phrases as involving unlawful printing within Her Majesty's dominions. If they cannot be so treated, neither ought the word "import" in the earlier part of the section to be so treated.

Thirdly, another consideration seems to my mind very important, namely, that on the limited construction of the section contended for the words as to importation constitute in themselves no offence, unless the offence of unlawfully printing within the Queen's dominions is also committed to the knowledge of the importer, which is equivalent to saying that they have no effect whatever as to the substantive rights of the proprietor of the copyright, and might be struck out of the section altogether without affecting those substantive rights. It is, to say the least, very doubtful whether there could be any case in which they would be necessary for the purpose even of enabling the action given by the section to be tried in the place of importation; but, however that may be, I think it impossible

C. A
1896
PITT PITTS
v.
GEORGE & Co.
Rigby L.J.

C. A. that they should have been introduced as they stand for such a limited purpose only.

1896
PITT PITTS I have considered at great, and it may be at undue, length
v. the construction of s. 15, on account of the grave consequences
GEORGE & Co. which the limited construction contended for might have upon
Rigby L.J. the rights of all owners of British copyright, whether in respect
of books first published in the United Kingdom or under the
International Copyright Acts. The result, in my judgment, is
that it applies to books imported for sale or hire from foreign
countries, including those imported from what may be called
the country of origin, though the latter are expressly excepted
from the absolute prohibition of s. 10 of the Act of 1844.

Having arrived at this conclusion with reference to s. 15, I
do not think it necessary to endeavour to construe s. 17. The
extraordinary language of that section, derived as it is from a
statute having a totally different object and clumsily adapted to
the case of copyright, renders it exceedingly difficult to ascertain
precisely the meaning and policy of the enactment. I will
only say that I am not satisfied that the plaintiff's right to
prevent the importation complained of might not be derived
from s. 17 in connection with s. 3 of the Act of 1844 if it were
necessary to fall back upon those sections.

It will follow, of course, that the appeal should be allowed,
with the consequences indicated by Lindley L.J.

Solicitors : *W. M. Tilson ; Mann & Taylor.*

H. C. J.

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INDEX.

- ABSENT PARTIES**—Accepting benefit of judgment—Practice - - - 788
See ESTOPPEL.
- ACQUIESCENCE**—Restrictive covenants—Alteration in character of estate - 294
See BUILDING ESTATE.
- ADMINISTRATION**—*Retainer—Right of—Mortgage by Intestate—Surety—Administratrix—Specialty Creditor.*
A., being entitled for life to certain leasehold property with remainder to B., mortgaged the same to secure 800*l.*, B. joining in the mortgage so as to bind her estate in remainder; and A. covenanted with B. to pay all moneys secured by the mortgage, and to keep indemnified the estate and interest of B. in the premises against all such moneys; and further, in case B. should at any time thereafter pay any money for the redemption of the premises, forthwith to repay such money with interest.
A. died intestate in 1893 without having paid the mortgage debt, and administration was granted to B., who duly paid the interest;—
Held, in a creditor's action for the administration of A.'s estate, that B. was at law a specialty creditor in respect of the whole debt, and was entitled to retain the assets of the intestate in her hands to answer the debt. *In re ALLEN. ADCOCK v. EVANS* - - - 345
— Absent parties—Accepting benefit of judgment - - - 788
See ESTOPPEL.
- AGENT**—Authority of—Stock certificate—Purchaser for value - - - 841
See COMPANY. 3.
- Unauthorized—Option of purchase—Ratification - - - 348
See CONTRACT.
- Vendor's name—Reference to formal contract - - - 737
See FRAUDS, STATUTE OF. 2.
- AGREEMENT**—Improvident bargain—Ratification—Rescission - - - 437
See CHAMPERTY.
- AMENDMENT**—Specification—Petition for revocation pending - - - 705
See PATENT.
- ANNUITY**—Breach of trust—Statutes of Limitations - - - 626
See TRUSTEE. 1.
- ANTICIPATION**—Restraint on—Separate use
See HUSBAND AND WIFE. 1, 2. 552, 620
- APPOINTMENT**—Exercise of power - 173
See POWER. 1.
— Statutes of Limitations—Settlement 562
See LIMITATIONS, STATUTE OF.
- APPORTIONMENT** - - - 199, 241
See TENANT FOR LIFE AND REMAINDERMAN. 1, 3.
- ARREARS**—Gas rate—Refusal to supply until arrears due from company paid - 476
See GAS.
- AUDITOR**—Duties as to stock-taking—Misfeasance - - - 279
See COMPANY. 17.
- BANKRUPTCY**—Forfeiture—Determinable life interest - - - 503
See SETTLEMENT. 2.
— Meaning of "legal disability" - 311
See WILL. 3.
— Of legatee debtor to testator—Retainer 584
See EXECUTOR.
- BILL OF EXCHANGE**—Promissory Note—"On Demand"—"At Maturity"—Delivery—Renunciation—Parol—"Maker"—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 62 (*sub-s.* 1), 89.
By s. 62, *sub-s.* 1, and s. 89 of the Bills of Exchange Act, 1882, when the holder of a promissory note at or after its maturity absolutely and unconditionally renounces his rights against the maker the bill is discharged, but the renunciation must be in writing unless the note is delivered to the "maker":—*Held* (affirming the decision of Kekewich J.), that a parol renunciation by the holder of all rights under a promissory

BILL OF EXCHANGE—*continued.*

note, accompanied by a delivery of the note to a devisee of the maker, the real estate in whose hands was liable to the payment of the debt, and who had for some time paid interest on it, did not operate as a discharge, for that although the word "maker" would probably be held to include the executors or administrators of the maker, it did not include his devisees. *EDWARDS v. WALTERS* - - - **C. A. 157**

BILL OF SALE—Debenture—Covering deed **212**
See COMPANY. 4.

BLANK IN WILL—"Charitable, philanthropic or" - - - **451**
See CHARITY. 1.

BONA VACANTIA—Charity—Failure of objects—Cy-près - - - **679, 727**
See FRIENDLY SOCIETY. 2, 3.

BOOK—British international copyright - **866**
See COPYRIGHT. 1.

BORROWING POWERS—Charging uncalled capital - - - **340**
See COMPANY. 2.

—Notice—Common officer to two companies
See COMPANY. 1. **743**

BREACH OF TRUST—Retaining investments—Insufficient security - - **763**
See TRUSTEE. 4.
—Statutes of Limitations - - **626**
See TRUSTEE. 1.

BUILDING ESTATE—Restrictive Covenants—Acquiescence—Alteration in Character of Estate—Injunction.

Where all the purchasers of lots of an estate are bound by restrictive covenants not to allow any trade or business to be carried on upon their lots, equitable relief in enforcing the covenants will be refused if the party suing has debarred himself from such relief by delay or acquiescence, or if the property has been so laid out and used that the object of the covenants, namely, the preserving the property as a residential property, can no longer be attained; but it will not be refused merely because in a few instances the covenants have not been enforced.

Decision of *Romer J.* affirmed. *KNIGHT v. SIMMONDS* - - - **C. A. 294**

CASES—*Ames v. Parkinson* (7 Beav. 379) distinguished - - - **763**
See TRUSTEE. 4.

—*Bidwell Brothers, In re* ([1893] 1 Ch. 603) disapproved - - - **572**
See COMPANY. 8.

—*Bishop v. Balkis Consolidated Co.* (25 Q. B. D. 512) observed upon - - **757**
See COMPANY. 13.

—*Bolton Partners v. Lambert* (41 Ch. D. 295) distinguished - - - **348**
See CONTRACT.

—*Bowden, In re* (45 Ch. D. 444) observed upon - - - **626**
See TRUSTEE. 1.

CASES—*continued.*

—*Bowditch v. Wakefield Local Board of Health* (L. R. 6 Q. B. 567) discussed - **254**
See LOCAL GOVERNMENT.

—*Brooklesby v. Temperance Permanent Building Society* ([1895] A. C. 173) applicable
See MORTGAGE. 1. **192**

—*Brown, Bayley and Dixon, In re* (18 Ch. D. 649) considered - - - **544**
See COMPANY. 16.

—*Bullock v. Caird* (L. R. 10 Q. B. 276) followed - - - **836**
See FOREIGN LAW.

—*Byrch, In re* (8 Beav. 124) distinguished **31**
See SOLICITOR. 6.

—*Caloric Engine and Siren Fog Signals Co., In re* (52 L. T. (N.S.) 846) discussed and followed - - - **572**
See COMPANY. 8.

—*Corcoran, In re* (62 L. J. (Ch.) 267) distinguished - - - **617**
See CHARITY. 2.

—*Cunnack v. Edwards* ([1896] 2 Ch. 679) distinguished - - - **727**
See FRIENDLY SOCIETY. 2.

—*Deeley v. Perkes* ([1896] A. C. 496) discussed
See PATENT. **705**

—*D'Eyncourt v. Gregory* (L. R. 3 Eq. 382) followed - - - **497**
See FIXTURES.

—*Elve v. Boyton* ([1891] 1 Ch. 501) distinguished - - - **590**
See TRUSTEE. 3.

—*Field, In re* (29 Ch. D. 608) discussed and followed - - - **797**
See SOLICITOR. 4.

—*Fox v. Fox* (L. R. 19 Eq. 286) dissented from - - - **711**
See WILL. 5.

—*Frape, In re* ([1893] 2 Ch. 284) distinguished
See SOLICITOR. 5. **107**

—*Gale v. Lewis* (9 Q. B. 730; 16 L. J. (Q. B.) 119) distinguished - - **743**
See COMPANY. 1.

—*Greville v. Browne* (7 H. L. C. 689) referred to - - - **720**
See WILL. 4.

—*Hemming, Ex parte* (28 L. T. (O.S.) 144) referred to - - - **107**
See SOLICITOR. 5.

—*Henry v. Great Northern Ry. Co.* (1 De G. & J. 606) distinguished - - **303**
See COMPANY. 6.

—*Hitchcock v. Stretton* ([1892] 2 Ch. 343) referred to - - - **107**
See SOLICITOR. 5.

—*Holland v. King* (6 C. B. 727) followed **348**
See CONTRACT.

—*House v. Earl of Dartmouth* (7 Ves. 137a) not applicable - - - **199**
See TENANT FOR LIFE AND REMAINDER-MAN. 3.

CASES—continued.

- *Income Tax (Commissioners for Special Purposes of the) v. Pemsel* ([1891] A. C. 531) referred to - - - 727
See FRIENDLY SOCIETY. 2.
- *Jamieson v. Trevelyan* (10 Ex. 269) explained See POWER. 2. 385
- *Jegon v. Vivian* (L. R. 6 Ch. 742) principle applied - - - 538
See TRESPASS.
- *Kelly, Ex parte* (31 L. R. Ir. 137) followed See RAILWAY COMPANY. 397
- *Knapp v. Burnaby* (9 W. R. 765) followed See INTEREST. 188
- *Lancashire Cotton Spinning Co., In re* (35 Ch. D. 656) considered - - 544
See COMPANY. 16.
- *Law and Gould, In re* (21 Beav. 481) distinguished - - - 31
See SOLICITOR. 6.
- *Martin v. Porter* (5 M. & W. 351) principle applied - - - 538
See TRESPASS.
- *Morris v. Wilson* (5 Jur. (N.S.) 168) followed See FRAUDS, STATUTE OF. 2. 737
- *Moser v. Marsden* (13 Rep. Pat. Cas. 24) discussed - - - 705
See PATENT.
- *Mulckern v. Doerks* (53 L. J. (Q.B.) 526) overruled - - - 224
See PRACTICE. 3.
- *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (13 Ch. D. 310) followed - - 649
See PRACTICE. 6.
- *Newton v. Anglo-Australian Investment, Finance and Land Co.* ([1895] A. C. 244) discussed and followed - - 340
See COMPANY. 2.
- *Nurse v. Durnford* (13 Ch. D. 764) followed See PRACTICE. 6. 649
- *Perry Herrick v. Attwood* (2 De G. & J. 21) applicable - - - 192
See MORTGAGE. 1.
- *Pertwee v. Townsend* ([1896] 2 Q. B. 129) approved of - - - 811
See RENT-CHARGE.
- *Phillips v. Homfray* (L. R. 6 Ch. 770) principle applied - - - 538
See TRESPASS.
- *Ravald v. Russell* (Younge, 9) followed 808
See MORTGAGE. 3.
- *Reynolds v. Howell* (L. R. 8 Q. B. 398) approved of - - - 649
See PRACTICE. 6.
- *Richards v. Overseers of Kidderminster* ([1896] 2 Ch. 212) considered - 663
See COMPANY. 9.
- *Robson, In re* (45 Ch. D. 71) discussed and followed - - - 797
See SOLICITOR. 4.
- *Rorke, Ex parte* ([1894] 1 I. R. 146) followed - - - 397
See RAILWAY COMPANY.

CASES—continued.

- *Shropshire Union Railways and Canal Co. v. Reg.* (L. R. 7 H. L. 496) distinguished See MORTGAGE. 1. 192
- *Smith's Case* ([1893] 1 Q. B. 323) undistinguishable - - - 476
See GAS.
- *Smurthwaite v. Hannay* ([1894] A. C. 494) followed - - - 224
See PRACTICE. 3.
- *Sudeley (Lord) and Baines & Co., In re* ([1894] 1 Ch. 334) discussed - 720
See WILL. 4.
- *Syer v. Gladstone* (30 Ch. D. 614), head-note in, commented on - - - 511
See TENANT FOR LIFE AND REMAINDERMAN. 2.
- *Thompson, In re* ([1894] 1 Q. B. 462; 63 L. J. (Q.B.) 187) referred to - 107
See SOLICITOR. 3.
- *Wavell, Re* (22 Beav. 634) distinguished 31
See SOLICITOR. 6.
- *Webb v. Earle* (L. R. 20 Eq. 556) distinguished - - - 303
See COMPANY. 6.
- *White, In re* ([1893] 2 Ch. 41) discussed See CHARITY. 1. 451
- *Wilmott v. Freehold House Property Co.* (51 L. T. (N.S.) 552) followed - 224
See PRACTICE. 3.
- *Wolmershausen v. Gullick* ([1893] 2 Ch. 514) applicable - - - 415
See TRUSTEE. 2.
- *Wright v. Ingle* (16 Q. B. D. 379) discussed See LOCAL GOVERNMENT. 254
- *Yettes, Re* (33 Beav. 412) distinguished 31
See SOLICITOR. 6.

- CERTIFICATE**—Purchaser for value—Authority of agent - - - 841
See COMPANY. 3.
- Shares fully paid up—Contributory—Estoppel - - - 525
See COMPANY. 12.

CHAMPERTY — Improvident Bargain — Unclaimed Property — Secret Information — Agreement with Heir — Ratification — Rescission.

A contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom the information is to be given, and nothing more, is not void for champerty. But if the contract be not merely that information shall be given, but also that the person who gives it and who is to share in what may be recovered shall himself recover the property, or actively assist in the recovery of it, then the contract is against the policy of the law and void, even if the property is in the hands of trustees, or in court, and no hostile action may be necessary to recover it.

A. died intestate having considerable real estate and leaving B. and C. his co-heiresses-at-law, both of whom were advanced in years, illiterate, and of a very humble rank in life. D., having ascertained the heirship of B. and C., induced them to sign an agreement whereby, in

CHAMPERTY—*continued.*

consideration of his revealing to them the existence of the property and their title to it (of both which circumstances they were wholly unaware), they agreed to give him one-half of the net amount of the property. At the same time D. verbally arranged to recover the property for them, and induced them to employ his solicitor to act for them in the matter. The property was in the hands of the public trustee in New Zealand, and the title of B. and C. was clear, and no litigation was contemplated. A portion of the proceeds of the property was received and divided on the terms of the agreement. On the death of B. and C. their executors brought an action against D. to have the documents set aside and cancelled:—

Held, that the agreement was in the nature of champerty and void:

Held, further, that the agreement must be set aside as an improvident bargain which D. had obtained by taking an unfair advantage of his position:

Held, also, that there had been no ratification of the contract by B. and C., as they never knew of their right to rescind it. *REES v. DE BERNARDY* - - - - - 437

CHANGE—Name of proprietor—Register - 520
See **TRADE-MARK**. 1.

CHARGE—Debts and legacies—Real estate—
Power of sale - - - - - 720
See **WILL**. 4.

CHARITY—Gift to—"Charitable, Philanthropic or"—Blank in Will—Construction of Will—Legacy—Charitable Bequest.

A bequest of money "for some one or more purposes, charitable, philanthropic or" is not bad simply by reason of the existence of the blank, but must be treated as one "for charitable or philanthropic purposes." Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable. *In re MACDUFF. MACDUFF v. MACDUFF* - - - - - C. A. 451

2. — Option to Invest on Government or Real Securities—Exercise of Option to Invest on Real Securities—Validity of Gift.

The validity of a charitable gift by will is not affected by the trustees exercising an option to invest in real security.

A testatrix disposed separately of all such parts of her personal estate "as could not by law be devoted to charitable purposes." She then gave the residue of her personal estate to trustees upon trust to convert it into money, invest the proceeds on Government or real securities, pay the income to her daughter for life, and after her death to apply the capital for the benefit of certain charities. The trustees during the life of the tenant for life invested out of the pure personality two sums of 350*l.* and 100*l.* in real securities, and they remained so invested at the death of the tenant for life:—

Held, by the Court of Appeal (reversing the decision of Kekewich J.), that the charitable gifts were not made pro tanto invalid by the investment in real securities.

In re Corcoran (62 L. J. (Ch.) 267) distinguished. *In re HAMILTON. CADOGAN v. FITZROY* C. A. 617

CHARITY—*continued.*

— Failure of objects—Cy-près - 679, 727
See **FRIENDLY SOCIETY**. 2, 3.

— Tenant for years—Personal liability 811
See **RENT-CHARGE**.

CLASS—Absent parties accepting benefit of judgment—Practice - - - - - 783
See **ESTOPPEL**.

COMPANY—Borrowing—Irregularity—Notice—Common Officer of Two Companies.

Where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the Court will not draw the inference that he has fulfilled these duties.

Gale v. Lewis (9 Q. B. 730; 16 L. J. (Q.B.) 119) distinguished.

The directors of a company were empowered to borrow money on its behalf, but not beyond a certain limit without the consent of a general meeting. A general meeting gave the required consent, but the notices summoning the meeting did not, as required by the regulations of the company, specify that borrowing beyond the limit was to be authorized by the meeting. The money was borrowed from a society the secretary of which was also the secretary of the company, and he knew of the irregularity:—

Held, that the knowledge of the secretary could not be imputed to the society, and that the money lent could be proved for in the winding-up of the company. *In re HAMPSHIRE LAND COMPANY* - - - - - 743

2. — Borrowing Powers—Uncalled Capital—Charging uncalled Capital—Sufficient Authority—Articles of Association—Alteration by Special Resolution.

The articles of association authorized the company to borrow upon mortgage of its freehold and leasehold hereditaments, works, and "other property and effects" for the time being of the company, or upon bonds or debenture notes of the company, or "in such other manner as the company may determine." The memorandum of association contained no reference to any borrowing:—

Held, that the company could under its articles mortgage its uncalled capital; and that, had it been necessary so to do, the company could by special resolution have extended its articles so as to confer upon itself the power to charge its uncalled capital.

Newton v. Anglo-Australian Investment, Finance, and Land Co. ([1895] A. C. 244) discussed and followed. *JACKSON v. RAINFORD COAL COMPANY* - - - - - 340

3. — Debenture Stock Certificate—Purchaser for Value—Mortgage—Authority of Agent.

A company applied to P., who had acted as its broker, for a loan of 3000*l.* on the security of

COMPANY—continued.

8000*l.* of its debenture stock, which was by the trust deed assignable free from equities. P. asked G. to lend 6000*l.* on the stock, and he consented to do so on the certificate for the 8000*l.* stock being deposited. After P. had communicated with the company, its secretary deposited as required a certificate under its seal stating that G. was the registered holder of 8000*l.* debenture stock of the company, and that the stock was only transferable by deed registered in the company's books. G. then paid 6000*l.* to P., who paid the company only 3000*l.* :—

Held, that, although the certificate was not a negotiable instrument, G. was entitled to assume that P. had full authority from the company to deal with it, and was not concerned to see that P. paid the 6000*l.* to the company; and that in an action to enforce the rights of the debenture stock holders, G. could prove for 8000*l.* provided he did not receive dividends exceeding 6000*l.* and interest. *ROBINSON v. MONTGOMERYSHIRE BREWERY COMPANY* - - - - 841

4. — *Debentures—Covering Deed—Receiver—Poor-rate—District Rate—Change of Occupancy—Winding-up—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 14—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 16—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 3—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24, sub-s. 2—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (a).*

A deed of charge on the assets of a company registered under the Companies Act, 1862, to cover debentures is not a bill of sale within s. 14 of the Bills of Sale Act, 1878, Amendment Act, 1882.

The general district rate of an urban sanitary authority is not a tax or poor or other parochial rate within the meaning of s. 14 of the Bills of Sale Act, 1878, Amendment Act, 1882.

A deed of floating charge on the assets of a company gave power to the trustee to appoint a receiver and manager, who was expressed to be the agent of the mortgagor :—

Held, that, on a receiver duly appointed under the power entering into possession of the premises and commencing to carry on the business of the company, there was a change of occupancy within the meaning of the Poor Rate Assessment and Collection Act, 1869, s. 16, and the Public Health Act, 1875, s. 211, sub-s. 3.

There is no preferential charge in respect of rates on effects of a company in the hands of a receiver for debenture-holders when the company is being wound up. *RICHARDS v. OVERSEERS OF KIDDERMINSTER. RICHARDS v. MAYOR OF KIDDERMINSTER* - - - - 212

5. — *Debentures—Set-off—Floating Security—Liquidated Demand—Hypothecation—Powers of Managing Director—Presumption of Regularity.*

A limited company agreed to sell to H., B. & Co. 7000 barrels out of their stock at 3*s.* 6*d.* each. H., B. & Co. paid for them; but the company fell into difficulties, its stock of barrels was exhausted, and as to more than 4000 it failed to

COMPANY—continued.

deliver them. The company had to the knowledge of H., B. & Co. issued debentures in the usual form of floating securities on all the property of the company. The debenture-holders obtained the appointment of a receiver, at which time H., B. & Co. owed the company a liquidated sum for rent, and had the above claim against the company in respect of the barrels :—

Held (reversing the decision of North J.), that the claim of H., B. & Co. against the company was a liquidated claim of 3*s.* 6*d.* for each barrel not delivered, there being as to each such barrel a total failure of consideration which entitled H., B. & Co. to recover back their purchase-money :

Held, further, that H., B. & Co. could set off this demand against what they owed to the company, and that the knowledge of the existence of the debentures as a floating security at the time when the debt due to them was contracted was not such notice of an assignment as to prevent a set-off binding the debenture-holders.

Persons dealing bonâ fide with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company a managing director can have.

Shortly before the appointment of the receiver, H., B. & Co. pressed the company for security for their claim as to the barrels; and at a meeting between them and the three directors of the company it was proposed, but not finally settled, that the company should issue debentures to H., B. & Co. by way of security, and should hypothecate to them various debts owing to the company. This meeting was adjourned to the next day, when only two directors were present (the quorum being three), but D., the managing director, was one of them. At this adjourned meeting H., B. & Co. advanced to the company money to pay wages, and D. gave them a letter, signed by him on behalf of the board, by which, in consideration of H., B. & Co. finding cash for wages and payment of barrels, he agreed to execute a deed in conjunction with the board of directors creating and issuing to them the remainder of an issue of debenture stock; and he also gave to them a number of orders addressed to debtors of the company informing them that the debts due from them were hypothecated to H., B. & Co. These orders were signed by D. as managing director. By the articles of the company the directors were authorized to appoint a managing director, and to delegate to him such of the powers of the board as they thought fit; and it was not disputed that the board had power to hypothecate. There was no minute shewing what powers had been delegated to D., nor of his appointment as managing director, but he had acted as such :—

Held (reversing the decision of North J.), that the hypothecations were valid. *BIGGERSTAFF v. ROWATT'S WHARF, LIMITED. HOWARD v. ROWATT'S WHARF, LIMITED* - - - - C. A. 93

6. — *Dividends—Preference Shares—Cumulative Dividend—Payment out of Net Profits of each Year.*

The memorandum of association of a company contained this clause: "The capital of the company is 150,000*l.*, divided into 10,000 ordinary

COMPANY—continued.

shares of 10l. each, and 5000 preference shares of 10l. each. The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10l. per cent. per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend the holders of ordinary shares shall be entitled to a like dividend at the rate of 10l. per cent. per annum on the amount paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend.”—

Held (reversing the decision of Chitty J.), that the preference shareholders were not entitled to a cumulative dividend of 10l. per cent. so as to have the deficiency in one year paid out of the profits of a subsequent year before paying anything to the ordinary shareholders.

Henry v. Great Northern Ry. Co. (1 De G. & J. 606) and *Webb v. Earle* (L. R. 20 Eq. 556) distinguished. *STAPLES v. EASTMAN PHOTOGRAPHIC MATERIALS COMPANY* — C. A. 303

7. — *Meetings—General Meeting—Special Resolution—Voting—Show of Hands—Declaration by Chairman—“Conclusive Evidence”—Shareholder—Action disputing Declaration—Notice of Special General Meeting—“General Nature” of Business—Sufficiency of Notice—“Member”—“Member entitled to Vote”—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51, Table A, Arts. 35, 37, 42.*

The declaration of the chairman at a special general meeting of shareholders under s. 51 of the Companies Act, 1862, that the special resolution has, on a show of hands, been carried, is not “conclusive evidence” of the fact so as to preclude a shareholder from disputing the validity of the resolution by legal proceedings on the ground, for instance, that it has not been carried by the statutory majority.

Although a notice under s. 51 of the Companies Act, 1862, of a special general meeting of a company regulated by Table A sufficiently complies with art. 35 if it states the “general nature” of the business, it is nevertheless desirable, where the business is of great importance, such as the proposed substitution of new articles of association for Table A, to supplement the notice with an explanatory circular.

Quære, whether, in the case of a company regulated by Table A to the Companies Act, 1862, any distinction is to be drawn between “members” who may constitute a quorum under art. 37, and “members entitled to vote” under s. 51 of the Act. *YOUNG v. SOUTH AFRICAN AND AUSTRALIAN EXPLORATION AND DEVELOPMENT SYNDICATE* — — — — — 268

8. — *Meeting of Shareholders—Special Resolution—Show of Hands—Proxies—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51—Blanks in Proxy—Validity—Authority to fill up—Duly Stamped—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 80.*

At a meeting of the shareholders of a company convened for the purpose of passing a special resolution, though the regulations of the company provide that votes may be given person-

COMPANY—continued.

ally or by proxy, a member present only by proxy has no right to vote upon a show of hands.

In re Caloric Engine and Siren Fog Signals Co. (52 L. T. (N.S.) 846) discussed and followed.

In re Bidwell Brothers ([1893] 1 Ch. 603) disapproved.

A notice convening an extraordinary general meeting to confirm a special resolution was accompanied by a circular from the secretary and directors with a proxy attached asking for the return of the proxy in support of the resolution; by a printer's error the date of the meeting was left blank in the proxy. The secretary filled up this blank in several of the proxies after they had been executed and returned by the members.—

Held, that, as the members by returning the proxies in compliance with the circular must have intended that they should be used at this particular meeting, the secretary had authority to fill in the date, and that these proxies were valid and duly stamped within the provisions of the Stamp Act, 1891, s. 80. *ERNEST v. LOMA GOLD MINES, LIMITED* — — — — — 572

9. — *Rates—Distress—Change of Occupation—Receiver and Manager, Order appointing—Possession—Parish Rates—Preferential Charge—Debenture—Equitable Charge—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 161—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 16.*

The existence of an equitable charge on goods does not protect them from distress for poor-rate.

Where an order is made appointing a receiver and manager of a company's business but not directing delivery-up of possession to him, and thereupon the receiver and manager enters upon the company's premises for the purpose of managing and carrying on the business, there is no change of occupation within s. 16 of the Poor Rate Assessment and Collection Act, 1869; and accordingly, under s. 2 of 43 Eliz. c. 2, and s. 161 of the Metropolis Management Act, 1855, the company's goods are liable to distress for the whole of the parish rates made for the half-year in which the order has been made; and this right of distress vested in the churchwardens and overseers of the parish prevails as against the equitable charge created by debentures charging, in the usual form, all the property of the company, where there is no assignment of chattels in the covering deed.

Whether possession taken by a receiver appointed under an order directing the company to deliver up possession to him creates a change of occupation within s. 16 of the Poor Rate Assessment and Collection Act, 1869, *quære*.

Richards v. Overseers of Kidderminster ([1896] 2 Ch. 212) considered. *In re MARRIAGE, NEAVE & CO. NORTH OF ENGLAND TRUSTEE, DEBENTURE AND ASSETS CORPORATION v. MARRIAGE, NEAVE & CO.* — — — — — C. A. 663

10. — *Underwriting Contract—Authority to apply for Shares—Authority coupled with an Interest—Shareholder—Removal of Name from Register.*

P. promoted a company for the purpose of

COMPANY—continued.

purchasing from him and working a mining property. On February 21, 1896, C. signed an underwriting letter addressed to P. by which he agreed, in consideration of a commission, to subscribe for 1000 shares in the company, such number to be reduced according to the number of shares taken by the public. C. further agreed that the agreement and application should be irrevocable, and, notwithstanding any repudiation by him, should be sufficient to authorize P. to apply for shares on behalf of C. and the company to allot them. P. by letter accepted these terms. The company was incorporated on March 24, and the subscription list was advertised to open on March 27, and close on the 30th. On March 27 C., who had applied for 1000 shares, stopped the cheque he had given for the deposit, and on the 30th wrote to P. and to the secretary of the company repudiating the agreement. P., however, on April 2, applied on behalf of C. for 980 shares, which, in the events which had happened, was the number he was bound to take, according to the terms of the letter, and the company allotted these shares to C. and put him on the register in respect of them :—

Held (affirming the decision of Stirling J.), that C. was rightly placed on the register and was not entitled to have his name removed, for that the authority given to P. by the underwriting letter to apply for shares on behalf of P. was an authority coupled with an interest, and therefore not revocable. *In re HANNAN'S EMPRESS GOLD MINING AND DEVELOPMENT COMPANY. CARMICHAEL'S CASE - - C. A. 643*

11. — Winding-up—Assets—Meaning of "Surplus Assets"—Construction of Articles of Association.

The term "surplus assets," when used in articles of association providing for distribution among the shareholders on a winding-up taking place, has no such recognised technical meaning that the Court is bound to construe it as referring to the assets after providing only for debts, liabilities, and costs, without recouping paid-up capital.

The capital of a company was 100,200*l.* in 100,000 ordinary shares and 200 founders' shares respectively of 1*l.* each, all of which (except one founders' share) were issued and fully paid up.

One of the articles of association was as follows: "If the company shall be wound up, one-fifth of the surplus assets (if any) shall belong to and be divided among the holders of founders' shares, and the remaining four-fifths of such surplus assets shall belong to and be divided among the holders of ordinary shares in proportion to the amount of capital paid up on the shares held by them."

Another article had provided that the profits in each year should be applicable in or towards payment of a dividend of 8 per cent. on the amount paid up on the ordinary shares, and that the surplus (if any) should be divided, as to one-fifth among the holders of founders' shares, and as to the other four-fifths among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon.

The company went into voluntary liquidation,

COMPANY—continued.

and, after providing for all debts, costs, and liabilities, a sum of about 90,000*l.* remained for distribution among the shareholders :—

Held, that, having regard to both articles, "surplus assets" meant the assets remaining after providing for debts, costs, and liabilities, and also recouping the paid-up capital subscribed by all the shareholders. *In re TRANSVAAL COMPANY - - - - - 750*

12. — Winding-up—Contributory—Certificate that Shares are fully paid up—Knowledge to the contrary—Estoppel.

B. lent to a limited company 1000*l.* on its promissory note on the terms that the company should give him collateral security on 10,000 fully paid-up 1*l.* preference shares, and that if the company should wish to pay off any part of the amount B. was to return shares at the same rate at which he had taken them. The company handed to B. certificates for 10,000 shares, which certificates stated that B. was the registered holder of them, and that they were fully paid up. They were in fact shares on which nothing had been paid. The company sold some of these shares, and B. executed transfers of the shares sold. His name remained on the register for the remainder when an order was made for winding up the company, and he was placed on the list of contributories in respect of them. B. applied to have his name struck out from the list of contributories on the ground that the company were estopped by the certificates from denying that the shares were fully paid up :—

Held (affirming the decision of Vaughan Williams J.), that as B. knew that the shares were the property of the company, that they had not been transferred to him, and that they had not been fully paid up by himself, he knew facts enough to lead any one who considered them to the conclusion that the shares were not fully paid up; that he, therefore, could not rely on the certificates as an estoppel, and that he must remain on the list of contributories. *In re VEUVE MONNIER ET SES FILS, LIMITED. Ex parte BLOOMENTHAL - - - - - C. A. 525*

13. — Winding-up—Contributory—Estoppel—Certification on Transfer.

Where a transfer for value purporting to relate to fully paid shares in a company bears on the face of it a certification by the secretary of the company that the share certificate has been lodged with the company, the certification amounts to a statement that a certificate of the shares described in the transfer has been lodged, and the company is estopped from denying that the shares are fully paid up, even though no certificate has been lodged with the secretary or the certificate lodged does not say whether the shares are fully paid up or not.

Bishop v. Ballis Consolidated Co. (25 Q. B. D. 512) observed upon. In re CONCESSIONS TRUST. MCKAY'S CASE - - - - - 757

14. — Winding-up—Contributory—Transfer of Shares during Voluntary Liquidation—Novation—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 38, 131, 133, 153.

Under s. 131 of the Companies Act, 1862, a

COMPANY—continued.

voluntary liquidator, although he may sanction a transfer of shares made after the commencement of the winding-up, and alter the register of members accordingly, has no power to allow an alteration of the status of the transferor so as to free him from his liability as a contributory.

The Court, however, has power to sanction an alteration of status, but ought not to do so unless it is satisfied that someone else is liable as a contributory in the place of the transferor.

A transferee taking shares under a transfer made after the commencement of a voluntary liquidation (even with the sanction of the liquidator) is not liable as a contributory although he may be under liability as a member of the company, but he is bound to indemnify the transferor.

Where, after the commencement of a voluntary winding-up, a shareholder had, with the liquidator's sanction, transferred shares, and the transferee, with the like sanction, had transferred them to a third person, the transferor was retained on the list of contributories, but both transferees were taken off it. *In re NATIONAL BANK OF WALES. TAYLOR, PHILLIPS, AND RICKARDS' CASE* - - - - - 551

15. — Winding-up—Contributory—Underwriting Letter.

On June 17, 1892, H. signed and delivered to the promoters of a company a letter agreeing that upon the public issue of its shares he would, in consideration of a percentage, subscribe for 400 shares. If the whole issue was *bonâ fide* subscribed for by the public, no allotment was to be made to H. The letter also contained an authority to the promoters, in the event of H. not applying for shares, to apply for them in his name, and an authority to the directors to allot them to him—"This engagement is binding on me for two months from this date." The shares were offered to the public on June 20, 21, and 22, but very few applications were made. On July 1, when the public subscription list was closed, the promoters signed a memorandum at the foot of the letter, dated July 1, 1892, and accepting H.'s offer. The letter with the memorandum thereon and an application by the promoters in H.'s name were on the same day sent to the company, and the shares were thereupon allotted to H. His name was put on the register of shareholders. He knew of this, and he paid the company the allotment money in respect of the shares, received his certificates, and on two occasions voted by proxy; but it was not shewn that he knew when the offer was accepted. The name was still on the register when the company went into liquidation nearly two years afterwards:—

Held, by Vaughan Williams J., that the promoters could not wait to see the result of the invitation to the public, and after it had failed, accept H.'s offer, and that he was not liable as a contributory:

Held, by Lopes and Kay L.JJ. (Lindley L.J. doubting), that the expression "This engagement is binding on me for two months" meant that the offer made by the letter was to be open for acceptance for two months; that the shares,

COMPANY—continued.

therefore, were properly applied for in H.'s name, and that the allotment to him was valid;

Held, that, whether the application for shares was authorized or not, H., having accepted them without inquiry, and having acted as a shareholder for nearly two years up to the time of the winding-up, could not now be heard to contend that he was not a shareholder. *In re HEMP, YARN AND CORDAGE COMPANY. HINDLEY'S CASE* [C. A. 121

16. — Winding-up—Distress—Liquidators—Possession—Mortgage—Interest—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 87, 163.

Where the liquidators and receivers of a cotton-mill company in liquidation, and whose mill was in mortgage, took possession of the mill without any objection on the part of the mortgagee, and kept it in working order so as to prevent deterioration and to enable them to sell it as a going concern, the Court refused to give the mortgagee leave to distrain for interest accrued since the date of taking possession, holding that the possession of the liquidators and receivers was as much for the benefit of the mortgagee as of the company.

It is easier for a landlord to obtain leave to distrain for rent accrued after a winding-up order than for a mortgagee to obtain leave to distrain for interest.

In re Lancashire Cotton Spinning Co. (35 Ch. D. 656) and

In re Brown, Bayley and Dixon (18 Ch. D. 649), considered. *In re HIGGINSHAW MILLS AND SPINNING COMPANY* - - - - - C. A. 544

17. — Winding-up—Misfeasance—Auditors—Duties as to Stock-taking—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10.

Held (affirming the judgment of Vaughan Williams J.), that where an officer of a company has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible in an action, such breach of duty is a "misfeasance" for which he may be summarily proceeded against under the Companies (Winding-up) Act, 1890, s. 10, and it is not necessary that an action should be brought.

For some years before a company was wound up, balance-sheets signed by the auditors were published by the directors to the shareholders in which the value of the company's stock-in-trade at the end of each year was grossly overstated. The auditors relied on certificates, willfully false, given by J., one of the directors who was also manager, as to the value of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its true value it would have appeared that there were no profits out of which a dividend could be declared. If the auditors had compared the different books and added to the stock-in-trade at the beginning of the year the amounts purchased during the year, and deducted the amounts sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so:—

COMPANY—*continued.*

Held (reversing the decision of Vaughan Williams J.), that, it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion, and that they were not liable for the dividends wrongfully paid.

An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care and skill. *In re KINGSTON COTTON MILL COMPANY* (No. 2) - C. A. 279

18. — *Winding-up—Scheme of Arrangement—Prepayment of Calls—"Discount."*

In an ordinary commercial document the word "discount" means rebate of interest, and not "true" or mathematical discount:—

So *held*, by the Court of Appeal, in the case of a scheme for arrangement with the creditors of a company in course of liquidation by which an option was given to shareholders to prepay calls "under discount at the rate of 4 per cent. per annum."

The decision of Vaughan Williams J. reversed. *In re LAND SECURITIES COMPANY. Ex parte FARQUHAR* - - - - C. A. 320

— Gas rate—Refusal to supply receiver until arrears due from company paid - 476
See GAS.

CONCURRENCE—Of husband—Real estate held on trust for sale - - - 358
See HUSBAND AND WIFE. 3.

CONDITION—Absolute gift—Subsequent condition—Repugnancy - - - 353
See WILL. 1.

CONFLICT OF LAWS—Lex fori—Partnership
See FOREIGN LAW. 836

CONSENT—Redemption—Mortgagee owner of limited estate - - - 808
See MORTGAGE. 3.

CONTRACT—*Option of Purchase—Time limited—Three Months' Notice—Notice by Agent—Unauthorized Agent—Ratification.*

Articles of partnership provided that, on the death of either partner, the survivor should have the option of purchasing the deceased partner's share, upon giving notice in writing of his intention so to do within three months from the death, and that in ascertaining the value of the deceased partner's share after such notice nothing should be allowed for the goodwill of the business. The surviving partner was of unsound mind, but notice of his intention to purchase was given on his behalf by his solicitor within three months from the death. An order was subsequently made under the Lunacy Acts authorizing a notice being given on his behalf, and a second notice was given accordingly, but after the three months had expired:—

Held, that as the option to purchase had not been exercised within the time limited, there was no contract which could be confirmed by the second notice, and, consequently, that the com-

CONTRACT—*continued.*

mittee of the surviving partner was not entitled to the benefit of the provision in the articles.

Holland v. King (6 C. B. 727) followed.

Bolton Partners v. Lambert (41 Ch. D. 295) distinguished. *DIBBINS v. DIBBINS* - - - 348

— Possession taken before, but continued after, parol contract - - - 428
See FRAUDS, STATUTE OF. 1.

— Underwriting—Authority to apply for shares - - - 643
See COMPANY. 10.

— Undue advantage—Ratification—Rescission
See CHAMPERTY. 437

— Vendor's name—Reference to formal contract - - - 737
See FRAUDS, STATUTE OF. 2.

CONTRIBUTION—Between co-trustees—Statute of Limitations - - - 415
See TRUSTEE. 2.

CONTRIBUTORY—Certificate that shares are fully paid up—Estoppel - - - 525
See COMPANY. 12.

— Estoppel—Certification on transfer - 757
See COMPANY. 13.

— Transfer of shares during voluntary liquidation - - - 851
See COMPANY. 14.

— Winding-up—Underwriting letter - 121
See COMPANY. 15.

COPYRIGHT—*Book—British International Copyright—Importation into Great Britain of Copies printed where the Book was first published—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 11, 13, 15, 17—International Copyright Act, 1844 (7 & 8 Vict. c. 12), ss. 2, 3, 10.*

The plaintiff was owner of the British International copyright of a book first published in Germany. The defendant imported and sold in Great Britain copies printed in Germany by the owner of the German copyright:—

Held, by Lindley and Rigby L.J.J. (dissentiente Lopes L.J.), reversing the decision of Kekewich J., that the plaintiff was entitled to restrain this importation and sale, for that s. 10 of the International Copyright Act, which, as regards any book in which there is British international copyright, prohibits the importation into Great Britain, without the consent of the proprietor of such copyright, of copies printed in any foreign country except that in which the book was first published, does not form a complete code as to the importation of copies; and that s. 3, which provides that the enactments in the Copyright Act shall apply to books in which there is British international copyright in the same way as if such books had been first published here, made ss. 15 and 17 of the Copyright Act applicable to the book in question, and that as under those sections the owner of the copyright could, if the book had been first published in Great Britain, have restrained the importation of these copies, the owner of the British international copyright could do so. *PITT PITTS v. GEORGE & Co.* - - - - C. A. 866

2. — *Designs—Registration—Shape—Patents, Designs, and Trade Marks Act, 1883*

COPYRIGHT—continued.

(46 & 47 Vict. c. 57), ss. 47, 60—*Patents, Designs, and Trade Marks Act, 1888* (51 & 52 Vict. c. 50).

C. registered a design for a "Lamp for electric lighting, applicable for its shape." It was, in fact, a design for a lamp-shade, consisting of a reflecting screen which had been commonly used for gas lights, and a ventilating top not materially differing from those which had been used before for gas, except that a chimney which was required for gas lights, but not for electric lights, was omitted:—

Held (reversing the decision of North J.), that what C. had registered was substantially the old form of lamp-shade with the omission of the chimney, which was useless when the shade was to be applied to electric lights, and that there was no such originality or novelty in the design as to make it a proper subject of registration. *In re CLARKE'S DESIGN* - - - C. A. 38

COSTS—Adding plaintiff without authority—
Liability of solicitor - - - 649
See PRACTICE. 6.

— Compulsory taking of land—Payment into court - - - 397
See RAILWAY COMPANY.

— Searching for documents not in vendor's possession - - - 328
See VENDOR AND PURCHASER.

— Solicitors'.
See Cases under SOLICITOR.

COUNSEL—Fees—Moneys received by solicitor for client - - - 487
See SOLICITOR. 1.

COVENANT—Restrictive—Alteration in character of estate—Injunction - - - 294
See BUILDING ESTATE.

— To pay money at a certain time—Interest
See INTEREST. 188

CROWN—Executors—Proceeds of sale of realty not effectually disposed of - - - 596
See ESCHEAT.

— Interlocutory injunction—Undertaking in damages - - - 696
See PRACTICE. 2.

CY-PRES—Charity—Failure of objects 679, 727
See FRIENDLY SOCIETY. 2, 3.

DAMAGES—Measure of—Trespass by tipping spoil - - - 538
See TRESPASS.

— Undertaking in—Interlocutory injunction—
Crown - - - 696
See PRACTICE. 2.

DEATH DUTY—Estate duty—Leaseholds 251
See REVENUE.

DEBENTURES - - - 93, 212, 841
See COMPANY. 3—5.

DESIGNS—Registration - - - 38
See COPYRIGHT. 2.

DISCLAIMER—Amendment of specification—
Practice - - - 705
See PATENT.

DISCOUNT—Commercial meaning of - 320
See COMPANY. 18.

DISCOVERY—Production of documents—Privilege - - - 826
See PRACTICE. 1.

DISSOLUTION—Friendly society—Infant members—Signature - - - 554
See FRIENDLY SOCIETY. 1.

DISTRESS—Liquidators—Possession—Mortgage—Interest - - - 544
See COMPANY. 16.

— Poor-rate—Change of occupancy - 663
See COMPANY. 9.

DIVIDEND—Cumulative—Payment out of net profits of each year - - - 303
See COMPANY. 6.

DIVORCE—*Settlement—Variation—Mistake—Relief in Equity—Jurisdiction—Terms—Matrimonial Causes Act, 1857* (20 & 21 Vict. c. 85), s. 45—*Matrimonial Causes Act, 1859* (22 & 23 Vict. c. 61), s. 5—*Married Woman—Disposition of Real and Personal Estate—Fines and Recoveries Act, 1833* (3 & 4 Will. 4, c. 74), ss. 1, 77—*Malins' Act* (20 & 21 Vict. c. 57).

By a post-nuptial settlement executed in 1877, and acknowledged by the wife under the Fines and Recoveries Act, property of the wife was settled upon trusts for the benefit of the husband and wife and the issue of the marriage; and the husband and wife covenanted for the settlement of the wife's after-acquired property. In November, 1893, the marriage was dissolved on the ground of the adultery of the wife. In December, 1893, the husband presented a petition for variation of the settlement, setting out the funds subject to the trusts thereof; and the wife by her answer admitted the same to be correct. On April 24, 1894, a consent order was made on the petition varying the settlement by directing payment of certain annual sums to the husband and the only child of the marriage. The wife, having married the co-respondent, brought an action for a declaration that certain property which upon the petition for variation had been assumed by all parties to be bound by the settlement was not so bound. The Court, being of opinion that the property in question was not included in the settlement, and that the terms of the order for variation had been agreed to by the parties under a common mistake, granted relief to the plaintiff, but upon the terms that any application to the Divorce Court, under s. 45 of the Act 20 & 21 Vict. c. 85, for a further settlement upon the husband and child of the marriage, should be dealt with in all respects as if it had been made before April 24, 1894, and was being considered by the Court on that day.

Real estate which devolved upon the wife upon the intestacy of her father, who died in 1893, was held not to be at the date of the settlement an "estate" in land within the meaning of s. 77 of the Fines and Recoveries Act; and interests in personal estate, to which she became entitled under the will of a testator who was living at the date of the settlement, were held not to be "future interests" of which she could dispose under the provisions of Malins' Act.

The "future interests" contemplated by the

DIVORCE—*continued.*

Act are interests to which, at the date of the disposing deed, the married woman has some existing title at law or in equity. *ALLCARD v. WALKER* 369

DOCUMENTS—Production of—Discovery—Privilege — — — 826

See PRACTICE. 1.

— Production of, not in vendor's possession—Expense of searching for — — 328
See VENDOR AND PURCHASER.

ESCHEAT—*Proceeds of Sale of Realty not effectually disposed of—Executors or the Crown entitled—Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), ss. 4, 7.*

A testatrix died without an heir, having devised a house of which she was legally seised in fee simple to her executors, upon trust for sale, and out of the proceeds to pay her debts, funeral expenses, and legacies. There was no gift of residue :—

Held, that the balance of proceeds of sale, after paying the debts, expenses, and legacies, did not belong to the executors for their own benefit, but escheated to the Crown. *In re WOOD.*

ATTORNEY-GENERAL *v.* ANDERSON — — 596

ESCROW—Mortgage by deposit—Conflicting equities—Priority — — 192

See MORTGAGE. 1.

ESTATE DUTY—Leaseholds—Primary charge
See REVENUE. 251**ESTOPPEL**—*Judgment—Practice—Administration—Res Judicata—Person not a Party or bound by Judgment—Cognizance of former Proceedings—Accepting Benefit of Judgment—Estoppel by Conduct—Absent Parties—Class Representation—Rules of Supreme Court, 1883, Order XVI., rr. 11, 32.*

A person not a party to an action or summons, nor technically bound by the judgment, but fully cognizant of the proceedings, who stands by and deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, is estopped by his conduct, where the circumstances are identical, from reopening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same will, though claiming in respect of a different interest.

An order appointing some one to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity. *In re LART.*
WILKINSON *v.* BLADES — — — 788

— Contributory—Certificate that shares are fully paid up — — — 525
See COMPANY. 12.

— Contributory—Certification on transfer—Shares — — — 757
See COMPANY. 13.

EVIDENCE—*Examination of Witnesses abroad—Practice—Letters of Request—Dissolution of Partnership.*

A commission or letters of request for the

EVIDENCE—*continued.*

examination of witnesses abroad ought not to be issued unless the evidence which it is proposed to obtain is evidence directly material to an issue in the cause, and not merely evidence which may be incidentally useful in corroboration of other evidence.

In an action for a dissolution of a partnership in England between wine merchants, on the ground of alleged misconduct of the defendant, the plaintiffs alleged that the defendant had bribed an employee of Pickford & Co. to inform him of the names and addresses of persons to whom Pickford & Co. forwarded wines on behalf of Continental wine merchants, so that the firm might canvass those persons for orders, and that this became known, and brought the firm into bad repute. The books of Pickford & Co. during the period to which this charge related had been destroyed. The plaintiffs set out a list of the names and addresses of the persons and firms to and by whom wines had been sent through Pickford & Co., and applied for letters of request to examine witnesses in Germany for the purpose of proving that wines were forwarded on their behalf during the period in question by Pickford & Co. Stirling J. ordered the letters of request to issue unless the defendant made admissions as to the forwarding of wines by Pickford & Co. :—

Held, that this order ought to be discharged, for that the evidence sought did not tend to prove bribery, though it might be useful in corroboration of direct evidence of bribery, and that it was not reasonable to require the admissions suggested, as the matters could not be within the defendant's own knowledge, and he could only obtain information about them by writing to rival tradesmen. *EHRMANN v. EHRMANN*
C. A. 611

EXAMINATION—Witnesses abroad—Letters of request — — — 611

See EVIDENCE.

EXECUTOR—*Retainer—Legatee Debtor to Testator—Bankruptcy of Legatee.*

A father deposited with a bank a sum of 2400*l.* (money of his own) as a continuing security for any amount which might from time to time be owing to the bank by a firm in which two of his sons were the only partners. Interest on the deposit was from time to time paid by the bank to the father. By his will the father gave legacies and shares of residue to the two sons. At the date of his death the sons owed 885*l.* to the bank, and the sons were afterwards adjudicated bankrupts. The bank proved in the bankruptcy for the whole 885*l.* No dividend having yet been paid in the bankruptcy, but it being admitted to be improbable that the estate would realize enough to pay the bank in full, and that the bank would ultimately appropriate the deposit of 2400*l.* towards the payment of the firm's debt :—

Held, that the trustees of the father's will were not entitled to retain the legacies and shares thereby bequeathed to the sons against the liability of the father's estate as surety to the bank, but that the trustee in the bankruptcy was entitled to receive those legacies and shares. *In re BINNS.* LEE *v.* BINNS — — — 584

EXECUTOR—continued.

- Escheat to Crown—Proceeds of sale of realty not disposed of - - - 596
See ESCHÉAT.
 — Heirlooms—Tapestry - - - 497
See FIXTURES.
 — Retaining investments—Insufficient security - - - 763
See TRUSTEE. 4.

FALSA DEMONSTRATIO—Construction of will
See WILL. 2. 364

FIXTURES—Tapestry—Heirlooms—Will—Executor and Heir.

Tapestry which had been cut and pierced so as to cover the walls of a room and the spaces left by the doors and mantelpiece, and hung by being nailed to wooden battens let into the plaster and nailed to the brickwork :—

Held, to pass as a fixture under a devise of the mansion-house.

D'Eyncourt v. Gregory (L. R. 3 Eq. 382) followed. *NORTON v. DASHWOOD* - - - 497

FOREIGN LAW—*Lex fori*—Partnership—Administration of Estate of Deceased Partner.

Creditors of a firm carrying on business in Spain brought an action in England, on behalf of the firm's creditors, against the executors of a member of the firm (who had died in England leaving property there) claiming that his estate, after payment of his funeral and testamentary expenses and separate debts, was liable for the firm's debts, and asking for administration on that footing. The defence was that the rights of the parties were governed by the law of Spain, under which the firm's creditors were not entitled to proceed against the separate estate of a deceased partner until after they had exhausted the property of the firm :—

Held, following *Bullock v. Caird* (L. R. 10 Q. B. 276), that the matter stated in the defence was mere procedure, and that the defence was bad. *In re DOETSCH. MATHESON v. LUDWIG* - - - 836

FORFEITURE—Determinable life interest—Bankruptcy - - - 503
See SETTLEMENT. 2.

FISHERY—Several—Accretions - - - 1
See RIVER.

FRAUD—“Actual”—Solicitor and client - 403
See MORTGAGE. 2.

FRAUDS, STATUTE OF—Contract—Part Performance—Possession taken before, but continued after, Parol Contract—Statute of Frauds (29 Car. 2, c. 3), s. 4.

Possession taken before, but continued after, a parol contract for a lease may, if unequivocally referable to the contract, constitute part performance, taking the case out of the Statute of Frauds.

A contract for a lease of land for more than three years was, after negotiation, entered into and reduced into writing in the form of a draft lease, which, however, was not signed by the intended lessor. Shortly before the contract was

FRAUDS, STATUTE OF—continued.

made, the intended lessee was let into possession, and he subsequently continued in possession and paid rent according to the terms of the draft lease :—

Held, that although the entry into possession was antecedent to the contract, yet the subsequent continuance in possession being, under the circumstances, unequivocally referable to the contract, constituted a part performance sufficient to take the case out of the Statute of Frauds. *HODSON v. HEULAND* - - - 428

2. — Contract—Vendor's Name—Agent for Vendor—Reference to Formal Contract—Vendor and Purchaser—Statute of Frauds (29 Car. 2, c. 3), s. 4.

The vendor's name was omitted from the conditions of sale by auction of a house and from the indorsed form of contract to be signed by a purchaser. The house was not sold at the auction; but subsequently the defendant sent a letter addressed on the face of it to J. & Co., who were the auctioneers, offering to purchase the house for 350*l.*, and stating that if his offer was accepted he would “sign contract on auction particulars.” J. & Co. replied by letter stating that on behalf of their client (who was the vendor), naming her, they accepted the offer “subject to contract as agreed. We enclose draft contract.” The draft was identical with the contract embodied in the conditions of sale and indorsement, except that the draft stated the vendor's name; but the defendant never signed it :—

Held, (1.) that as the offer contained the names of both contracting parties (though one was only agent of an undisclosed vendor), on its acceptance there was a valid contract within the Statute of Frauds; (2.) that the acceptance was absolute and unconditional, inasmuch as a form of contract definitive in all its terms was identified by the offer, and that signature to the form of contract was unnecessary.

Morris v. Wilson (5 Jur. (N.S.) 168) followed. *FILBY v. HOUNSELL* - - - 737

FRIENDLY SOCIETY—Dissolution—Infant Members—Branch composed of Minors—Governing Committee—Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), ss. 9, 13, 15, 25, 27—Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), ss. 6, 15, sub-s. 8, s. 25.

In 1873 a friendly society called the “Loyal Social Design Lodge” instituted a society to be called the juvenile branch of the lodge, and drew up rules for it which were registered and certified. The society was to consist of persons between the ages of six and eighteen. By rule 3, it was to be “governed” by a committee of eight appointed by the lodge. It was provided by rule 21 that no rules should be altered without the consent of a majority of members present at a special meeting. The members having been reduced to six persons about sixteen years of age, one of the members and the fathers of the rest on their behalf, without the consent of the committee, signed an instrument for dissolution of the society and distribution of its funds under the Friendly Societies Act, 1855, s. 13, and the Friendly Societies Act, 1875, s. 25, and the dissolution was advertised. The trustees in whom the property

FRIENDLY SOCIETY—continued.

of the society was vested brought an action to set aside the instrument. *Kekewich J.* held that it must be set aside, on the ground that the fathers had no sufficient authority to sign on behalf of their children:—

Held, by the Court of Appeal, that as the Act of 1875 preserved the rules of old societies so far as they were not contrary to the Act, rule 3 was still in force; that it was to be considered a fundamental rule of the society from which the members could not escape; that the members could not dissolve the society without the consent of the committee; and that the instrument of dissolution must be set aside.

Whether, if the infant members had power by themselves to dissolve the society by signing an instrument of dissolution, an instrument signed for them by their fathers, guardians, or agents would suffice, *quære*. *RUDD v. JAMES* C. A. 554

2. — Failure of Objects—Poverty—"Charity"—Charitable Legacy—Lapse—Cy-près.

In 1800 a friendly society was established to provide, by subscriptions, contributions and fines, an "invested fund" for the relief, by means of annuities, of members, their widows and children, if in distressed circumstances.

By the will of a testator who died in 1893 a legacy of 500*l.* was bequeathed to the society for the purposes thereof. At that time there were only three annuitants living, being widows of deceased members, and there was only one member remaining, who was also sole surviving trustee of the "invested fund," which was amply sufficient to provide for the three annuities. Subsequently two of the three annuitants died.

On an originating summons by the executors of the will against the sole surviving member, the sole surviving annuitant, and the residuary legatees, to ascertain whether the society was entitled to the legacy:—

Held, (1.) that the society was a "charity" within *Commissioners for Special Purposes of the Income Tax v. Pemsel* ([1891] A. C. 531); (2.) that it was a charity existing at the testator's death and therefore the legacy had not lapsed; and (3.) that the legacy, not being required for the remaining annuity, was applicable *cy-près*.

Cunnack v. Edwards ([1896] 2 Ch. 679) distinguished. *In re BUCK. BRUTY v. MACKEY* 727

3. — Failure of Objects—Surplus or unexpended Funds — Charity — Cy-près — Bona Vacantia—Resulting Trust.

In 1810 a society was established to raise a fund, by the subscriptions, fines, and forfeitures of its members, to provide annuities for the widows of its deceased members. In 1830 the rules were revised, and the society conformed to the provisions of the Friendly Societies Act, 1829, but the objects of the society were in no way altered. By 1879 all the members had died. The last widow-annuitant died in 1892, the society then having a surplus or unexpended fund of 1250*l.*:—

Held, that there was no resulting trust in favour of the legal personal representatives of the members of the society: that the society was not a "charity," and therefore the unexpended fund was not applicable *cy-près* to charitable purposes;

FRIENDLY SOCIETY—continued.

and that the fund passed to the Crown as bona vacantia.

Decision of Chitty J. ([1895] 1 Ch. 489) reversed. *CUNNACK v. EDWARDS* - C. A. 673

GAS—Arrears of Gas Rate—Refusal to Supply Receiver until Arrears due from Company Paid—Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16—Gas Light and Coke Company's Act, 1872 (35 & 36 Vict. c. xxiii.), s. 18.

A limited company (M. & Co.) was supplied with gas by a gas company. In February, 1896, P. was appointed manager and receiver of the business of M. & Co. by debenture-holders, and shortly afterwards P. and S. were appointed by the Court joint receivers and managers in an action on behalf of a higher class of debenture-holders. They entered and carried on the business, and were supplied with gas by the gas company. At the time when P. was appointed there was due to the gas company 90*l.* for gas supplied to M. & Co. The gas company threatened to cut off the supply unless the 90*l.* arrears was paid, and the receiver brought an action to restrain them. *Kekewich J.* granted an injunction to restrain them from doing so, holding that the receivers were new tenants entitled in their own right to a supply of gas without liability for the arrears due from M. & Co.:—

Held, on appeal, that the relation of the plaintiffs to M. & Co. was not that of incoming and outgoing tenant, but of caretaker and owner, and that the plaintiffs were in no better position against the gas company than M. & Co. were, and could not claim a supply of gas except on payment of the arrears. *PATERSON v. GAS LIGHT AND COKE COMPANY* - - - C. A. 476

HEIRLOOM—Tapestry—Executor and heir 497
See FIXTURES.

HUSBAND AND WIFE—Separate Estate—Restraint on Anticipation—Removal by the Court—"Benefit"—Payment of Debts incurred through Extravagance—Married Woman—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.

The Court will not make an order under s. 39 of the Conveyancing Act, 1881, in a case where it is sought to remove the restraint on anticipation merely for the purpose of raising money for the payment of debts incurred through the extravagance of the married woman or her husband.

The decision of Chitty J. ([1896] 1 Ch. 901) affirmed. *In re POLLARD'S SETTLEMENT* C. A. 552

2. — Separate Use—Restraint on Anticipation—Married Woman—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

A restraint on anticipation may, in a settlement made since the Married Women's Property Act, 1882, come into operation, be effectually annexed to a life estate thereby given to her, though not in terms limited to her separate use, and only made separate estate by force of the Act.

Such restraint is not invalidated by the life estate being given without impeachment of waste.

Decision of North J. affirmed. *In re LUMLEY. Ex parte HOOD BARRS* - - - C. A. 690

HUSBAND AND WIFE—*continued.*

3. — *Wife's Conveyance*—*Married Woman*
—*Trustee*—*Sale of Real Estate held on Trust for Sale*—*Conveyance to Purchaser*—*Concurrence of Husband*—*Married Women's Property Act, 1882* (45 & 46 Vict. c. 75), ss. 1, 18, 24.

The Married Women's Property Act, 1882, does not enable a woman married since the commencement of the Act, being a trustee of real estate for sale, to convey to a purchaser except with the concurrence of her husband, and by a deed acknowledged by her. *In re HARKNESS AND ALLSOPP'S CONTRACT* - - - 358

HYPOTHECATION—*Liquidated demand*—*Floating security*—*Set-off* - - - 93
See COMPANY. 5.

INFANT—*Dissolution of friendly society*—*Signature* - - - 554
See FRIENDLY SOCIETY. 1.

INJUNCTION—*Crown*—*Undertaking in damages*
See PRACTICE. 2. 696

— *Restrictive covenants*—*Alteration in character of estate* - - - 294
See BUILDING ESTATE.

INTEREST—*Covenant to Pay a Sum of Money within Six Months after Death*—*Time Certain*—3 & 4 Will. 4, c. 42, s. 28.

A testator covenanted that his executors or administrators should pay a sum of 2000*l.* within six calendar months after his decease. Default was made in payment of the sum at the time named:—

Held, that the sum carried interest from the time named to the date of payment; the sum being "payable at a certain time" within the meaning of s. 28 of 3 & 4 Will. 4, c. 42.

Knapp v. Burnaby (9 W. R. 765) followed.
In re HORNER. Fooks v. HORNER - - - 188

— *Mortgage*—*Devises of onerous and beneficial property* - - - 511
See TENANT FOR LIFE AND REMAINDERMAN. 2.

— *Mortgage*—*Winding up of company*—*Distress* - - - 544
See COMPANY. 16.

INTERLOCUTORY INJUNCTION—*Crown*—*Undertaking in damages* - - - 696
See PRACTICE. 2.

INTERNATIONAL COPYRIGHT—*Books* - 866
See COPYRIGHT.

INTESTACY—*Proceeds of sale of realty not effectually disposed of* - - - 596
See ESCHEAT.

INVESTMENT—"Company incorporated by Act of Parliament" - - - 590
See TRUSTEE. 3.

— *Executor retaining*—*Insufficient security*
See TRUSTEE. 4. 763

— *Exercise of option to invest on real securities*—*Validity of gift* - - - 617
See CHARITY. 2.

IRRELEVANCY—*Production of documents*—*Privilege* - - - 826
See PRACTICE. 1.

JOINDER OF ACTIONS—*Leave of Court*—*Waiver of irregularity* - - - 224
See PRACTICE. 3.

JOINTURE—*Portions* - - - 385
See POWER. 2.

JUDGMENT—*Accepting benefit of*—*Absent parties* - - - 788
See ESTOPPEL.

— *Not signed or entered*—*Judgment creditor*—*Priority* - - - 863
See PRACTICE. 4.

LAPSE—*Charity*—*Failure of objects*—*Cy-près*
See FRIENDLY SOCIETY. 2, 3. 679, 727

LEASE—*In consideration of rent and premium*—*Fee for negotiating* - 229, 797
See SOLICITOR. 3, 4.

LEASEHOLDS—*Estate Duty*—*Primary charge*
See REVENUE. 251

LEGACY—"Charitable, philanthropic or" —
—*Blank in will* - - - 451
See CHARITY. 1.

LEX FORI—*Administration of estate of deceased partner* - - - 836
See FOREIGN LAW.

LIMITATIONS, STATUTES OF—*Settlement*—*General Power of appointment*—*Appointment by Will*—*Appointees*—"Reading in"—*Real Property Limitation Act, 1833* (3 & 4 Will. 4, c. 27), ss. 1, 2, 3, 20—*Real Property Limitation Act, 1874* (37 & 38 Vict. c. 57), ss. 1, 2.

At and prior to Lady Day, 1876, a plot of land then forming part of the Devon settled estates was held by S. as tenant from year to year under an agreement dated in 1852. S. continued in possession down to his death in 1889, and after that date his representatives continued in possession. No rent was ever paid in respect of this plot of land after Lady Day, 1876.

Under a settlement dated in 1857 the Devon estates, including the reversion in the plot of land expectant on the tenancy of S., stood limited in the events which happened to the use of the eleventh Earl of Devon for life, remainder to the use of the twelfth Earl for life, remainder to such uses as the eleventh Earl should by deed or will appoint. This power was exercised by the eleventh Earl by his will, whereby he appointed the estates to H. and others as trustees. The eleventh Earl died in 1888, and on his death the twelfth Earl succeeded to the possession of the estates, and died in 1891 without having recovered the land in question. On the death of the twelfth Earl the remainder limited to H. and his co-trustees fell into possession, and the question was whether their estate was barred by the Statutes of Limitations:—

Held, that the case fell within the latter part of s. 2 of the Real Property Limitation Act, 1874, and that the twelfth Earl, being the person last entitled to a particular estate, and not being in possession or receipt of the profits of the land in question when his interest determined by his death in 1891, H. and his co-trustees had a further period of six years from that time to bring their action, and therefore that their

LIMITATIONS, STATUTES OF—continued.

estate was not barred. *In re* EARL OF DEVON'S SETTLED ESTATES. *WHITE v. EARL OF DEVON. In re* STEER. *STEER v. DOBELL* - - - 562
 — Breach of trust - - - 626

See TRUSTEE. 1.

— Items barred by—Taxation of costs - 263
 See SOLICITOR. 2.

— Right to contribution as between co-trustees
 See TRUSTEE. 2. 415

LIQUIDATOR—Distress—Possession—Mortgage
 —Interest - - - 544
 See COMPANY. 16.

LOCAL GOVERNMENT—Street—National School—Trustees—Statutory Conveyance—Local Authority—Making up Road—Recovery of Expenses—"Owners"—"Charge"—School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 6—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 257.

Under s. 6 of the School Sites Act, 1841, a piece of land was conveyed to trustees for ever for the purposes of the Act as a site for a national school, "and for no other purpose whatever":—

Held, that the trustees were "owners" of the school premises within the definition in s. 4 of the Public Health Act, 1875, and as such liable, under s. 257, for the apportioned expenses incurred by the local authority for making up an adjoining road: also that, until payment, such expenses were, under the same section, a "charge" upon the premises, though, as to the mode of enforcing the charge, *quære*.

Bowditch v. Wakefield Local Board of Health (L. R. 6 Q. B. 567) and Wright v. Ingle (16 Q. B. D. 379) discussed. *HORNSEY DISTRICT COUNCIL v. SMITH* - - - 254

LUNACY—Person "lawfully detained"—English Person lawfully detained abroad—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, sub-s. 1, cl. (c).

The expression "lawfully detained" as a lunatic though not so found by inquisition," as used in s. 116, sub-s. 1, cl. (c), of the Lunacy Act, 1890, means "lawfully detained" under the provisions of that Act, i.e., within the jurisdiction; and does not apply to an Englishman detained in a foreign country in accordance with the laws of that country. *In re* WATKINS - C. A. 336

MAINTENANCE—Gift to class at twenty-one—
 Vesting - - - 711
 See WILL. 5.

MARRIED WOMAN.

See Cases under HUSBAND AND WIFE.

MEETINGS—"General nature" of business—
 Sufficiency of notice - - - 268
 See COMPANY. 7.

— Proxies—Authority to fill up—Duly stamped
 See COMPANY. 8. 572

MISFEASANCE—Auditors—Duties as to stock-taking - - - 279
 See COMPANY. 17.

MISTAKE—Settlement—Variation—Terms
 See DIVORCE. 369

MORTGAGE—Escrow—Mortgage by Deposit—Legal Estate—Conflicting Equities—Priority—Trust for Sale—Breach of Trust—Trustee and
 VOL. II. 1896.

MORTGAGE—continued.

Cestui que Trust—Execution of Deed—Receipt in body of Deed—Fraud—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 2 (viii.), 54 (1), 55 (1).

In 1887 freeholds were mortgaged to a building society by H. to secure advances. In October, 1892, H. died, having devised these freeholds to N. upon trust for sale. In December, 1892, C., the solicitor who acted for the society, and also for H., and, after his death, for N., having fraudulently represented to the society that notice to pay off their mortgage had been given, procured the statutory receipt to be indorsed on the mortgage of 1887, and obtained possession of the title-deeds of the property: the money owing to the society was never paid off, N. at this time being unaware of the existence of the mortgage. N. shortly afterwards agreed to sell the property to C., who was at this time in good repute and supposed to be well off, and by a deed of December 29, 1892, which recited the trust for sale in H.'s will, N., in consideration of 700*l.*, paid to him by C. at or before the execution of the deed the receipt whereof N. thereby acknowledged, conveyed the property to C. in fee. The purchase-money was not in fact paid. This conveyance and the other title-deeds, except the mortgage of 1887 and the statutory receipt, were shortly afterwards deposited by C. with the plaintiffs as security for an advance of 650*l.* In 1893 C. was adjudicated bankrupt, his frauds were discovered, and he was convicted and sentenced. The plaintiffs now claimed to enforce their security against the society, and against C. and his *cestui que trust*. It was admitted that the society had priority over N. and his *cestui que trust*, and the main contention was between the plaintiffs and the society, and the plaintiffs and N. and his *cestui que trust*:—

Held, that the society were entitled under the circumstances to shew that they had never been paid off, that the statutory receipt and the mortgage of 1887 were delivered only as an escrow, and the mortgage not having been paid off, and the legal estate being still in the society, they had priority over the plaintiffs:

Held, also, that the conveyance of December, 1892, was not void as between the plaintiffs and N. and his *cestui que trust*; that as N. had authority to deal with the property, the plaintiffs, in the absence of express notice, were entitled to rely on the receipt in the body of the deed, and had priority over the *cestui que trust: Shropshire Union Railways and Canal Co. v. Reg. (L. R. 7 H. L. 496)* distinguished:

Held further, that for the purposes of the present case there was no material distinction between agency and trust, and that the principles laid down by *Perry Herrick v. Atwood (2 De G. & J. 21)* and approved in *Brockslesby v. Temperance Permanent Building Society ([1895] A. C. 173)* applied. *LLOYDS BANK, LIMITED v. BULLOCK* - - - 192

2. — Priority—Registration—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 7, 14—Deposit of Deeds—Solicitor and Client—Notice—"Actual Fraud."

The Yorkshire Registries Act, 1884, applies

MORTGAGE—*continued.*

to a charge by deposit of deeds unaccompanied by a memorandum of deposit.

The priorities given by the Act are not to be altered except in cases of actual fraud, which means fraud importing grave moral blame.

In 1889 certain beneficiaries under a will deposited with a bank the title-deeds of an estate in Yorkshire to secure an overdraft by the trustees in order that the trustees might be guaranteed against loss in carrying on the testator's business. This was done with the knowledge and approval of J., a solicitor, who represented one of the trustees in this matter. The charge was never registered. J. subsequently took a mortgage of the same property and registered it, and he claimed priority over the bank. The bank, being satisfied with the personal security of the trustees, did not contest the claim:—

Held, that J. was guilty of actual fraud in taking advantage of a defect in the bank's security to defeat the interests of his client, and that he was not entitled to the protection of the Act. *BATTISON v. HOBSON* - - - 403

3. — *Redemption—Remainderman—Consent of Tenant for Life or for limited Estate.*

A testator, having mortgaged land in fee, devised it (as the Court construed his will) to his wife during the minority of his two sons, and directed that when they were of age the property should be equally divided between his wife and children, whichever of them might be living at that time. After the testator's death the widow mortgaged her interest under the will to the original mortgagee, and died while the sons were still infants. The infants, by a next friend, brought an action against the mortgagee to redeem the testator's mortgage:—

Held, on the authority of *Ravald v. Russell* (Younge, 9), that, during the continuance of the widow's limited estate, the plaintiffs were not entitled to redeem the testator's mortgage without the consent of the mortgagee as owner of the limited estate. *PROUT v. COCK* - - - 808

— Existing at testator's death—Insufficient security - - - 763
See TRUSTEE. 4.

— Interest—Devise of onerous and beneficial property - - - 511
See TENANT FOR LIFE AND REMAINDERMAN. 2.

— Interest—Distress—Winding-up of company - - - 544
See COMPANY. 16.

— Originating summons—Application by mortgagor without offering to redeem 830
See PRACTICE. 5.

— Specialty creditor—Right of retainer 345
See ADMINISTRATION.

— Stock certificate—Purchaser for value—Authority of agent - - - 841
See COMPANY. 3.

NATIONAL SCHOOL—Street—Recovery of expenses—"Owners" - - - 254
See LOCAL GOVERNMENT.

NOTICE—Borrowing—Common officer of two companies - - - 743
See COMPANY. 1.

— Option of purchase—Unauthorized agent—Ratification - - - 348
See CONTRACT.

ORIGINATING SUMMONS—Application by mortgagor without offering to redeem 830
See PRACTICE. 5.

PARTIES—Absent, accepting benefit of judgment—Practice - - - 788
See ESTOPPEL.

— Adding plaintiff without authority—Costs
See PRACTICE. 6. 649

PARTNERSHIP—Deceased partner's share—Option of purchase - - - 348
See CONTRACT.

— Dissolution—Examination of witnesses abroad—Letters of request - - - 611
See EVIDENCE.

— Lex fori—Administration of estate of deceased partner - - - 836
See FOREIGN LAW.

PATENT—Disclaimer—Amendment of Specification—Practice—Petition for Revocation pending—Application for Leave to Amend—Discretion of Court—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 19.

The granting or refusing leave to apply to amend a specification by way of disclaimer, under s. 19 of the Patents Act, 1883, is still a matter for the judicial discretion of the Court, and this discretion has been in no way interfered with by *Moser v. Marsden* (13 Rep. Pat. Cas. 24) and *Deeley v. Perkes* ([1896] A. C. 496). *In re DELLWICK'S PATENT* - - - 705

POOR-RATE—Distress—Change of occupancy
See COMPANY. 9. 663

— District rate—Bills of Sale Act - - - 212
See COMPANY. 4.

PORIONS—Jointure—Construction of power 385
See POWER. 2.

POWER—Exercise—Power to Husband by Deed or Will to Appoint Income to "his Wife"—Appointment by Husband to his then Wife—Subsequent Appointment in favour of his Second Wife.

By a post-nuptial settlement power was given to a husband by deed or deeds to appoint a fund, after the determination of his own interest therein, amongst his children, subject to a proviso empowering him by deed or will to appoint one-fourth of the income to "his wife" for her life. The husband in exercise of these powers by deed irrevocably appointed one-fourth of the income in favour of his then wife for her life, and, "subject and without prejudice to the trust" in her favour "thereinbefore limited, if the same should take effect," he appointed the fund amongst his two daughters (who were adults) and his one son (who was under age) in equal thirds, reserving, as to his son, a power of revocation which he subsequently exercised by irrevocably appointing one-third of the fund to such son absolutely.

POWER—*continued.*

The then wife afterwards died; the husband married again; and on his second marriage he purported by deed irrevocably to appoint one-fourth of the income of the fund to his second wife during her life :—

Held, by the Court of Appeal (affirming the decision of Kekewich J.), that the appointment of income in favour of the second wife was ineffectual. *In re HANCOCK, MALCOLM v. BURFORD-HANCOCK* - - - - **C. A. 173**

2. — Jointure — Portions — Construction of Power.

Prima facie, a jointure is an estate to the wife for life to take effect on the death of the husband. *Jamieson v. Trevelyan* (10 Ex. 269) explained.

A testator devised his real estates in strict settlement, subject to a trust for the accumulation of the rents and profits for a period of twenty-one years from his death, and he empowered every person becoming tenant for life under the will by deed or will (1.) to appoint a rent-charge for any wife for her life or any less period; (2.) to charge the devised estates with portions in favour of younger children; (3.) to charge the said estates in the meantime with an annual sum not exceeding 4 per cent. interest upon the expectant portions of the children for their maintenance and education, such powers to take priority over the trust for accumulation. The first power was referred to in the will as a power of jointuring, and followed the form in Davidson's Conveyancing Precedents save for the omission of the words "by way of jointure." The second and third powers conferred on the donee an absolute discretion as to the mode and time of payment :—

Held, (1.) that the first power did not authorize an appointment to a wife to take effect in the lifetime of her husband; (2.) that the third power authorized an appointment of interest by a father in favour of his infant children to be made payable to himself as their guardian, and that such an appointment was not invalidated by the fact that the father had the means to support his children. *In re DE HOGHTON. DE HOGHTON v. DE HOGHTON* - - - - **385**

— Appointment by will - - - - 562

See LIMITATIONS, STATUTES OF.

POWER OF SALE—Charge of debts and legacies

—Real estate - - - - **720**

See WILL. 4.

PRACTICE—*Discovery—Production of Documents—Sealing up—"Privilege"—Relevancy—Inspection by Court or Judge—Jurisdiction—Rules of Supreme Court, 1883, Order XXXI., r. 19A, sub-r. 2.*

The word "privilege" in Order XXXI., r. 19A, sub-r. 2, is not to be construed in a narrow sense so as to exclude the case of an objection to discovery based on the ground of irrelevancy. It includes any ground on which inspection is sought to be resisted. *EHRMANN v. EHRMANN* **826**

2. — Injunction—Crown, Action on behalf of—Interlocutory Injunction—Attorney-General—Undertaking in Damages.

In granting an interlocutory injunction at the instance of the Attorney-General on behalf of the Crown, the Court will not, as a general rule, require the Attorney-General to give the under-

PRACTICE—*continued.*

taking in damages usually required from an ordinary plaintiff as a condition of his obtaining such an injunction.

Decision of North J. affirmed. *ATTORNEY-GENERAL v. ALBANY HOTEL COMPANY* **C. A. 696**

3. — Joinder of other Cause of Action—Action for Recovery of Land—Leave of Court—Waiver of Irregularity—Rules of Supreme Court, 1883, Order XVIII., r. 2; Order LXX., r. 2.

The plaintiff claimed a declaration that an alleged mortgage of land to the defendant created no charge on the land comprised in it, and he claimed possession of the land. The plaintiff claimed alternately an account of what was due on the mortgage, and redemption. The plaintiff was a judgment creditor of the mortgagor; he had obtained an order appointing him receiver of the rents of the land, and the order had been registered. On a summons by the defendant to stay all proceedings in the action, on the ground that no leave of the Court had been obtained to join another cause of action with the action for the recovery of the land :—

Held, that, though the defendant had entered an appearance to the writ, it was not too late for him to take the objection : but

Held, that the plaintiff was entitled without leave to ask for possession of the land in either alternative—immediate possession if the mortgage was invalid, and possession on payment of what should be found due if the mortgage was valid.

Mulhern v. Doerks (53 L. J. (Q.B.) 526) is overruled by *Wilmott v. Freehold House Property Co.* (51 L. T. (N.S.) 552) and *Smurthwaite v. Hannay* ([1894] A. C. 494). *HUNT v. WORSFOLD* **224**

4. — Judgment—Leave to sign—Judgment not signed or entered—Judgment Creditor—Priority—Rules of Supreme Court, 1883, Order XIV., r. 1; Order XLI., rr. 3, 4.

An order under Order XIV., r. 1, giving liberty to sign final judgment for the amount claimed by the writ of summons, is not equivalent to signing or entry of judgment, so as to give a judgment creditor's right of priority to a plaintiff who has failed to follow up the order by signing judgment under Order XLI. *In re GURNEY. CLIFFORD v. GURNEY* - - - - **863**

5. — Originating Summons—Construction of Deed—Rules of Supreme Court, 1883, Order LIV. A, r. 1—Application by Mortgagor without offering to Redeem.

Under Order LIV. A, r. 1, a mortgagor may apply by originating summons for the determination of a question of construction arising under the mortgage deed without offering to redeem.

Where the mortgagor of a reversionary interest applied under Order LIV., r. 1, for the determination of the question whether, according to the true construction of the mortgage deed, she was entitled to redeem during the period fixed by the deed for the continuance of the loan :—

Held, that the Court was bound to decide the question, and ought not to put the mortgagor on the terms of offering to redeem. *In re NOBBS. NOBBS v. LAW REVERSIONARY INTEREST SOCIETY* **830**

PRACTICE—continued.

6. — Parties — Adding Plaintiff without Authority—Stay of Proceedings—Costs—Liability of Solicitor—Rules of Supreme Court, 1883, Order XVI., r. 11—"Own Consent in Writing."

Rule 11 of Order XVI. of the Rules of the Supreme Court, 1883, provides that no person shall be added as a plaintiff, or as the next friend of a plaintiff, in an action "without his own consent in writing thereto":—

Held, that the consent must be the consent of the party himself in writing, and signed by him; and the consent in writing of his solicitor on his behalf, signed by the solicitor, though written and signed in his presence, would not be sufficient to bind him.

Decision of Kekewich J. reversed.

Where a person has been made a plaintiff in an action without proper authority, and orders have, without his knowledge, been made against him, under which he is liable to pay costs to the defendants, the practice is, in accordance with the rule laid down in *Reynolds v. Howell* (L. R. 8 Q. B. 398), and followed in *Nurse v. Durnford* (13 Ch. D. 764), and *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (13 Ch. D. 310), to direct a stay of proceedings in the name of the person named as plaintiff, and all proceedings against him in the action since he was added as plaintiff, and to strike out his name for the purpose of future proceedings. The solicitor who wrongly made him a party will be ordered to pay all his costs, and all the costs which he has been ordered to pay, and also all the defendants' costs (the costs of the person named as plaintiff as between solicitor and client, and the costs of the defendants as between party and party), and such costs will include the costs of the application by the person named as plaintiff to be dismissed from the proceedings. *FRICKER v. VAN GRUTTEN*

C. A. 649

— Absent parties—Accepting benefit of judgment - - - 788
See ESTOPPEL.

— Examination of witnesses abroad—Letters of request - - - 611
See EVIDENCE.

— Vesting order—Reduction of number of trustees - - - 508
See TRUSTEE. 5.

PREFERENCE SHARES—Cumulative dividends
See COMPANY. 6. 303

PRIORITY—Conflicting equities - - - 192
See MORTGAGE. 1.

— Judgment not signed or entered—Judgment creditor - - - 863
See PRACTICE. 4.

— Registration—Yorkshire Registries Act
See MORTGAGE. 2. 403

PRIVILEGE—Discovery—Production of documents - - - 826
See PRACTICE. 1.

PRODUCTION OF DOCUMENTS—Discovery—Privilege - - - 826
See PRACTICE. 1.

PRODUCTION OF DOCUMENTS—continued.

— Not in vendor's possession—Expense of searching for - - - 328
See VENDOR AND PURCHASER.

PROMISSORY NOTE—Renunciation—Parol 157
See BILL OF EXCHANGE.

PROXY—Authority to fill up—Duly stamped—Meetings - - - 572
See COMPANY. 8.

PURCHASER—For value—Stock certificate—Authority of agent - - - 841
See COMPANY. 3.

RAILWAY COMPANY—Compulsory taking of Land—Payment of Purchase-money into Court—Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 80, 82.

Leaseholds, which stood limited by will to one for life, and subject thereto to a class of children and grandchildren of the testator absolutely, were, during the life tenancy, taken compulsorily by a railway company and the purchase-money paid into court. On the death of the tenant for life the fund, which was divisible into eleven shares, was ordered to be distributed. All the original legatees and the executors had died since the payment into court, and for the purpose of obtaining payment out, letters of administration were taken out to the estates of all the deceased beneficiaries:—

Held, following *Ex parte Kelly* (81 L. R. Ir. 137) and *Ex parte Rorke* ([1894] 1 L. R. 146), that the company must pay the costs of taking out the letters of administration. *In re LLOYD AND THE NORTH LONDON RAILWAY (CITY BRANCH) ACT*, 1861 - - - 397

RATE—Distress—Change of occupancy—Appointment of receiver - - - 663
See COMPANY. 9.

— Gas rate—Refusal to supply receiver until arrears due from company paid - 476
See GAS.

— Poor-rate—Bills of Sale Act - - - 212
See COMPANY. 4.

RATIFICATION—Improvident bargain—Agreement with heir - - - 437
See CHAMPERTY.

— Unauthorized agent—Option of purchase
See CONTRACT. 348

RECEIVER—Gas rate—Refusal to supply until arrears due from company paid - 476
See GAS.

— Rates—Distress—Change of occupancy 663
See COMPANY. 9.

REDEMPTION—Consent of mortgagee as owner of limited estate - - - 808
See MORTGAGE. 3.

REGISTRATION—Trade-mark - - - 600
See TRADE-MARK.

REMAINDERMAN.
See Cases under TENANT FOR LIFE AND REMAINDERMAN.

RENT-CHARGE—*Tenant for Years—Personal Liability—Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 3.*

A tenant for years is not liable in an action of debt for non-payment of a rent-charge issuing out of the land of which he is in occupation, nor in the case of a rent-charge created for charitable purposes is he liable in an action in the Chancery Division at the instance of the Attorney-General or the Charity Commissioners. *In re HERBAGE RENTS, GREENWICH. CHARITY COMMISSIONERS v. GREEN* - - - - - 811

RENUNCIATION—Parol—Promissory note—Delivery - - - - - 157
See BILL OF EXCHANGE.

REPUGNANCY—Absolute gift—Subsequent condition - - - - - 353
See WILL. 1.

RES JUDICATA—Absent parties—Accepting benefit of judgment - - - - - 788
See ESTOPPEL.

RESTRAINT ON ANTICIPATION—Married woman—Separate estate - - - - - 552, 690
See HUSBAND AND WIFE. 1, 2.

RESTRICTIVE COVENANT—Alteration in character of estate—Injunction - - - - - 294
See BUILDING ESTATE.

RESULTING TRUST—Failure of objects—Cy-près. See FRIENDLY SOCIETY. 2, 3. 679, 727

RETAINER—By solicitor of a sum for costs 107
See SOLICITOR. 5.

— Legatee debtor to testator—Bankruptcy of legatee - - - - - 584
See EXECUTOR.

— Right of—Surety—Specialty creditor 345
See ADMINISTRATION.

REVENUE—*Estate Duty—Leaseholds—Will—Specific Legatee—Primary Charge—General Personal Estate—Title—Executor—Assent—Assignment—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.*

As leaseholds specifically bequeathed are property which by law passes to the executor as such, the estate duty upon them under the Finance Act, 1894, is payable out of the testator's general personal estate, and is not primarily charged upon them under s. 9, sub-s. 1.

The title to leaseholds specifically bequeathed vests, upon the assent of the executor, absolutely in the legatee, without any deed of assignment. *In re CULVERHOUSE. COOK v. CULVERHOUSE* 251

RIVER—*Riparian Owner—Several Fishery—Accretions.*

The plaintiffs, under an inclosure award made in 1803, were entitled to a piece of land at Wraybury bounded on one side by the Thames, which is there navigable but not tidal. The land ended in an almost perpendicular bank five or six feet high, and the bed of the river reached to its foot, the water often reaching some height above the foot. The defendant was entitled to a several fishery in the river and to the bed of the river. The water of the river, owing to the removal of a weir, sank, and at the foot of the bank a deposit took place forming a strip on which some large trees grew, and which during some part of the

RIVER—*continued.*

year was left dry, but it was overflowed during a considerable part of the year. At the foot of the bank the defendant dug a ditch which he regularly cleaned out for more than twelve years, and afterwards filled it up with concrete so as to make a footpath. The plaintiffs brought an action for an injunction to restrain him from trespassing:—

Held, by Romer J., that whether the strip had ceased to be part of the bed of the river was a question to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations of the river, the nature of the land, and its growths and user, and that in the present case, the strip had ceased to be part of the bed and belonged to the plaintiffs as having been formed by gradual accretion to their land:—

Held, on appeal, that the principle on which Romer J. had proceeded in determining whether the strip was part of the bed of the river was sound, but that on the facts the strip had not ceased to form part of the bed, and therefore belonged to the defendant: but that when it was dry the rights of the plaintiffs as riparian proprietors were not affected, and they had right of access over it to the water, and could use it to the same extent as they could use the bed of the river in its old state.

Whether the accretions, if they had ceased to form part of the bed of the river, would have been the property of the plaintiffs as owners of the adjoining land, *quære*.

Whether the doctrine of accretion could apply in a case where the steep six foot bank which formed the original boundary between the lands of the plaintiffs and defendant still remained clearly defined, *quære*. *HINDSON v. ASHEY*

C. A. 1

RULES OF SUPREME COURT:—

— Order XIV., r. 1 (Writ specially Indorsed) See PRACTICE. 4. 863

— Order XVI., r. 11 (Parties) - - - - - 649
See PRACTICE. 6.

— rr. 11, 32 - - - - - 788
See ESTOPPEL.

— Order XVIII., r. 2 (Joinder of causes of action) - - - - - 224
See PRACTICE. 3.

— Order XXXI., r. 19a, sub-r. 2 (Discovery and Inspection) - - - - - 826
See PRACTICE. 1.

— Order XLI., rr. 3, 4 (Entry of Judgment) See PRACTICE. 4. 863

— Order LIV. A, r. 1 (Declaration on Originating Summons) - - - - - 830
See PRACTICE. 5.

— Order LXX., r. 2 (Effect of non-compliance) See PRACTICE. 3. 224

SALE—Power of—Charge of debts and legacies See WILL. 4. 720

SCHEME OF ARRANGEMENT—Prepayment of calls—"Discount" - - - - - 320
See COMPANY. 18.

SEPARATE ESTATE—Restraint on anticipation
—Married woman - - - 552, 690
See **HUSBAND AND WIFE**. 1, 2.

SET-OFF—Debentures—Liquidated demand—
Hypothecation - - - 93
See **COMPANY**. 5.

SETTLED LAND—Mortgages—Interest - 511
See **TENANT FOR LIFE AND REMAINDER-
MAN**. 2.

SETTLEMENT—Construction—"Next of Kin in blood"—"Intestate."

In a gift to next of kin a reference to the death of the propositus intestate imports division among blood relations according to the Statute of Distributions.

Consols were settled on trust after the death of M. A. Gray for "the next of kin in blood to the said M. A. Gray . . . in case she had so died intestate and unmarried":—

Held, that children of deceased brothers and sisters of M. A. Gray were entitled as well as living brothers and sisters to share in the fund. *In re GRAY'S SETTLEMENT*. **AKERS v. SEARS** 802

2. — **Forfeiture Clause**—Settlement of Settlor's own Property—Determinable Life Interest—Forfeiture—Breach of Trust—Bankruptcy—"Cease to be payable."

By a settlement of 1878, property of the settlor was assigned by him to trustees upon trust to pay the income to him until his death or bankruptcy, or until he should "assign charge or incumber the said income or do or suffer anything whereby the same or some part thereof would through his act or default become payable to or vested in some other person or persons," with remainder in favour of the children of the marriage. In 1887 the settlor induced the surviving trustee to lend him the greater part of the trust fund, and the money thus obtained was spent by him for his own purposes. In 1891 the settlor became bankrupt. Proceedings were subsequently taken on behalf of the children of the marriage with the result that the funds lost by the breach of trust were replaced, and the question now raised was, whether the settlor's interest had been forfeited prior to the bankruptcy by the dissipation of the trust fund:—

Held, that the settlor's interest had not been determined prior to the bankruptcy; and that, as the limitation until bankruptcy was void as against his creditors, his life interest passed to the trustee in bankruptcy, and that the income of the trust fund was now payable to a purchaser from the trustee during the life of the settlor.

Semble: Had the settlement contained a limitation over if the income should "cease to be payable" to the settlor, the dissipation of the trust fund would have worked a forfeiture. *In re BREWER'S SETTLEMENT*. **MORTON v. BLACKMORE** - - - 503

— **Appointees**—Statutes of Limitations 562
See **LIMITATIONS, STATUTES OF**.

— **Variation**—Mistake—Terms - - 369
See **DIVORCE**.

SHARES.

See **COMPANY**.

SOLICITOR—Costs—Taxation—Common Order—

SOLICITOR—continued.

Solicitor and Client—Moneys received by Solicitor for Client—Counsel's Fees.

The provision in the common order to tax a solicitor's bill, that the solicitor "do give credit for all sums of money by him received of or on account of" the client, includes and is confined to all moneys which the solicitor, in his character of solicitor or agent of the client, has received, or is legally or equitably liable to pay over to the client, and against which (if sued for by the client) the solicitor could set off his costs when taxed.

Consequently the solicitor is not bound to give credit for moneys received by him and applicable to the payment of fees due by him to the client as counsel in matters not connected with the bill of costs.

Observations on the honorary character of counsel's fees. *In re LE BRASSEUR AND OAKLEY* **C. A. 487**

2. — **Costs—Taxation—Common Order to Tax—Items barred by Statute of Limitations—Submission to pay what is "Due"—Solicitor and Client—Purchase of several Lots at one Time—Separate Title—Scale Charge—General Order under Solicitors' Remuneration Act, 1881, Sched. I., Part I., rule 8.**

Statute-barred costs are, under the common order to tax, subject to taxation, since the Statute of Limitations does not bar the debt but only the remedy; and such costs are recoverable from the client by reason of his usual submission to pay what shall appear to be "due" on the taxation. If the client desires to raise the question whether certain items are statute-barred, he should do so by applying for a special order to tax.

A solicitor acted for the purchaser of several small lots of land all purchased at the same time, though not from the same vendor, at prices varying from 100l. to 10l. The lots were comprised in one mortgage, but each had a separate and distinct title, a separate abstract for each being delivered:—

Held, that the solicitor was entitled, under rule 8 in Sched. I., Part I., of the rules under the 'Solicitors' Remuneration Act, 1881, to the minimum charge of 5l. or 3l. for each lot, and was not restricted to one charge for the business as a whole. *In re MARGETTS* - - - 263

3. — **Costs—Taxation—Lease at Rent and Premium—Minimum Scale Charge—Costs of Taxation—General Order under Solicitors' Remuneration Act, 1881, Sched. I., Part I., rr. 7, 8; Part II., r. 5.**

A lease for ninety-nine years, determinable on three lives, was granted at an annual rent of 12s. 1d. and a premium or fine of 12l. 1s. 8d.:—

Held, that the lessor's solicitors were entitled to a fee of 5l. in respect of the rent under Sched. I., Part II. (second scale), to the General Order under the Solicitors' Remuneration Act, 1881, and to an additional fee of 3l. in respect of the premium by virtue of rule 5 in Part II. and rule 8 in Part I. of Sched. I.

The lessor's solicitors wrote on December 24 to the lessee's solicitors that their charges in relation to the lease amounted to 7l. 11s. On January 1

SOLICITOR—*continued*.

the lessee's solicitors wrote asking for particulars of the charges. In reply the lessor's solicitors on January 2 sent a bill with detailed items, amounting to 10*l.* 10*s.* 8*d.*, adding at the foot, "Say 7*l.* 11*s.*" The lessee obtained an order to tax the bill, and on the taxation the whole of the 7*l.* 11*s.* was allowed:—*Held* (affirming the decision of the taxing master), that the bill was delivered on December 24; that the bill sent on January 1 was merely explanatory; and that, the bill not having been reduced on taxation, the solicitors were entitled to the costs of the taxation. *In re HELLARD & BEWES* - - - 229

4. — *Costs—Taxation—Lease in consideration of Rent and Premium—Fee for Negotiating—Scale Fee—General Order under Solicitors' Remuneration Act, 1881* (44 & 45 Vict. c. 44), *Sched. I, Part II, rule 5.*

Where a lease is granted in consideration of a fine or premium as well as of a rent, the lessor's solicitor is not entitled to charge a further fee for negotiating in addition to the scale fee in respect of rent chargeable under Part II. of *Sched. I.* to the General Order under the Solicitors' Remuneration Act, 1881, and the deducting fee chargeable on the premium under rule 5 of the rules to Part II., *Sched. I.* The negotiation fee is included in the scale fee chargeable in respect of rent.

In re Field (29 Ch. D. 608) and *In re Robson* (45 Ch. D. 71) discussed and followed. *In re HORN & FRANCIS* - - - 797

5. — *Costs—Taxation—Retainer—Delivery of Bill—Payment—Solicitors' Act, 1843* (6 & 7 Vict. c. 73), ss. 37, 41—*Solicitors' Remuneration Act, 1881* (44 & 45 Vict. c. 44), s. 8.

Held (affirming the decision of Chitty J.), that retainer by a solicitor of a sum for costs is not payment of his bill within the meaning of the Solicitors' Act, 1843, and does not affect the right to taxation, although the sums from time to time retained for costs have been entered in accounts settled and approved by the client:

Held, further, that where a verbal agreement had been made that the solicitor should be paid for his costs in obtaining loans a certain percentage on the amounts borrowed, such expressions as "costs as agreed," designating the sums charged in the accounts for costs, which accounts were settled and signed by the client, were referable to the verbal agreement, and could not, as in *In re Frupe* ([1893] 2 Ch. 284), be construed as meaning "costs which are hereby agreed at the amount of," and that there was therefore no written agreement signed by the client entitling the solicitors to those sums as his remuneration:

Held, further, that the delivery of the bills of costs under the order of the Court would not make the retainer amount to payment within the principle of *Ex parte Hemming* (28 L. T. (O.S.) 144), *In re Thompson* ([1894] 1 Q. B. 462; 63 L. J. (Q.B.) 187), and *Hitchcock v. Stretton* ([1892] 2 Ch. 343). *In re BAYLIS* - - - C. A. 107

6. — *Costs—Taxation—Taxation of one of several Bills—Order of Course.*

A solicitor delivered to his clients seven bills of costs, relating to seven different matters in which he had acted for them, together with a

SOLICITOR—*continued*.

cash account which shewed that the seven bills amounted to 26*l.* 15*s.*, and that the solicitor had received 160*l.* on account, leaving a balance of 10*l.* 15*s.* due to him. The clients then paid him a further sum of 50*l.* on account of the balance, he giving a written undertaking "to return to you any sum that may be found due from me on taxation of my bills delivered." The next day the solicitor wrote to the clients that he accepted the 50*l.* in full discharge of all claims by him against them, and asked them to treat the 50*l.* as the balance due on the cash account, and not the 10*l.* 15*s.*

The clients were dissatisfied with one of the bills, which was for 17*l.* 18*s.* 10*d.*, and obtained an order of course for the taxation of that bill alone. After this the clients' new solicitor wrote to the solicitor saying that all the other bills were agreed to and paid, so that this was the only bill outstanding. On a motion by the solicitor to discharge the order for irregularity:—

Held, by North J., that inasmuch as the solicitor had admitted that nothing was due to him, and he could therefore have no lien on the clients' documents, the only question being whether he had been overpaid, the order was not irregular.

In re Byrch (8 Beav. 124); *In re Law and Gould* (21 Beav. 481); *Re Wavell* (22 Beav. 634); and *Re Yetts* (33 Beav. 412) distinguished.

An appeal from this decision was dismissed. *In re WARD* - - - C. A. 31

— *Liability—Costs—Adding plaintiff without authority* - - - 649
See PRACTICE. 6.

SOLICITORS' REMUNERATION ORDER, Sched. I, Part I, rr. 7, 8; Part II, r. 5 229
See SOLICITOR. 3.

— — — *r. 8* - - - 263
See SOLICITOR. 2.

SPECIALTY DEBT—Retainer—Right of 345
See ADMINISTRATION.

SPOIL—Trespass by tipping—Measure of damages - - - 538
See TRESPASS.

STAMPS—Proxy—Authority to fill up—Meetings
See COMPANY. 8. 572

STATUTES:—

43 Eliz. c. 2, s. 2—*Poor* - - - 663
See COMPANY. 9.

29 Car. 2, c. 3, s. 4—*Frauds* - - - 428, 737
See FRAUDS, STATUTE OF. 1, 2.

3 & 4 Will. 4, c. 27, ss. 1, 2, 3, 20—*Real Property Limitation* - - - 562
See LIMITATIONS, STATUTES OF.

3 & 4 Will. 4, c. 42, s. 28—*Administration of Estates* - - - 188
See INTEREST.

3 & 4 Will. 4, c. 74, ss. 1, 77—*Fines and Recoveries* - - - 369
See DIVORCE.

4 & 5 Vict. c. 38, s. 6—*School Sites* - - - 254
See LOCAL GOVERNMENT.

5 & 6 Vict. c. 45, ss. 2, 11, 13, 15, 17—*Copyright* - - - 866
See COPYRIGHT. 1.

STATUTES—continued.

| | | |
|---|-----|----------|
| 6 & 7 Vict. c. 73, ss. 37, 41— <i>Solicitors</i> | - | 107 |
| <i>See SOLICITOR. 5.</i> | | |
| 7 & 8 Vict. c. 12, ss. 2, 3, 10— <i>Copyright (International)</i> | - | 866 |
| <i>See COPYRIGHT. 1.</i> | | |
| 8 & 9 Vict. c. 18, ss. 80, 82— <i>Lands Clauses</i> | 397 | |
| <i>See RAILWAY COMPANY.</i> | | |
| 10 & 11 Vict. c. 15, s. 16— <i>Gasworks Clauses</i> | | |
| <i>See GAS.</i> | 476 | |
| 18 & 19 Vict. c. 63, ss. 9, 13, 15, 25, 27— <i>Friendly Societies</i> | - | 554 |
| <i>See FRIENDLY SOCIETY. 1.</i> | | |
| 18 & 19 Vict. c. 120, s. 161— <i>Metropolis Management</i> | - | 663 |
| <i>See COMPANY. 9.</i> | | |
| 20 & 21 Vict. c. 57— <i>Married Women</i> | - | 369 |
| <i>See DIVORCE.</i> | | |
| 20 & 21 Vict. c. 85, s. 45— <i>Divorce Court</i> | 369 | |
| <i>See DIVORCE.</i> | | |
| 22 & 23 Vict. c. 61, s. 5— <i>Matrimonial Causes</i> | | |
| <i>See DIVORCE.</i> | 369 | |
| 25 & 26 Vict. c. 89, ss. 38, 131, 133, 153— <i>Companies</i> | - | 851 |
| <i>See COMPANY. 14.</i> | | |
| — s. 43 | - | 212 |
| <i>See COMPANY. 4.</i> | | |
| — s. 51 | - | 572 |
| <i>See COMPANY. 8.</i> | | |
| — Table A, arts. 35, 37, 42 | 268 | |
| <i>See COMPANY. 7.</i> | | |
| — ss. 87, 163 | - | 544 |
| <i>See COMPANY. 16.</i> | | |
| 32 & 33 Vict. c. 41, s. 16— <i>Poor Rate Assessment and Collection</i> | - | 212, 663 |
| <i>See COMPANY. 4, 9.</i> | | |
| 33 & 34 Vict. c. 35, ss. 2, 3, 4, 5— <i>Apportionment</i> | - | 241 |
| <i>See TENANT FOR LIFE AND REMAINDERMAN. 1.</i> | | |
| 35 & 36 Vict. c. xxiii., s. 18— <i>Gas Light and Coke Company's Act</i> | - | 476 |
| <i>See GAS.</i> | | |
| 37 & 38 Vict. c. 57, ss. 1, 2— <i>Real Property Limitation</i> | - | 562 |
| <i>See LIMITATIONS, STATUTES OF.</i> | | |
| 38 & 39 Vict. c. 55, ss. 4, 257— <i>Public Health</i> | | |
| <i>See LOCAL GOVERNMENT.</i> | 254 | |
| — s. 211, sub-s. 3 | - | 212 |
| <i>See COMPANY. 4.</i> | | |
| 38 & 39 Vict. c. 60, ss. 6, 15, sub-s. 8; s. 25— <i>Friendly Societies</i> | - | 554 |
| <i>See FRIENDLY SOCIETY. 1.</i> | | |
| 44 & 45 Vict. c. 41, ss. 2 (viii.), 54 (1), 55 (1)— <i>Conveyancing and Law of Property</i> | 192 | |
| <i>See MORTGAGE. 1.</i> | | |
| — s. 3, sub-s. 6 | - | 328 |
| <i>See VENDOR AND PURCHASER.</i> | | |
| — s. 24, sub-s. 2 | - | 212 |
| <i>See COMPANY. 4.</i> | | |
| — s. 39 | - | 552 |
| <i>See HUSBAND AND WIFE. 1.</i> | | |

STATUTES—continued.

| | | |
|---|-----|----------|
| 44 & 45 Vict. c. 44, s. 8— <i>Solicitors' Remuneration</i> | - | 107 |
| <i>See SOLICITOR. 5.</i> | | |
| — Sched. I, Part I., rr. 7, 8: Part II., r. 5 | - | 229 |
| <i>See SOLICITOR. 3.</i> | | |
| — Sched. I., Part II., r. 5 | - | 797 |
| <i>See SOLICITOR. 4.</i> | | |
| 45 & 46 Vict. c. 43, s. 14— <i>Bills of Sale</i> | - | 212 |
| <i>See COMPANY. 4.</i> | | |
| 45 & 46 Vict. c. 61, ss. 62 (sub-s. 1), 89— <i>Bills of Exchange</i> | - | 157 |
| <i>See BILL OF EXCHANGE.</i> | | |
| 45 & 46 Vict. c. 75, ss. 1, 18, 24— <i>Married Women's Property</i> | - | 358 |
| <i>See HUSBAND AND WIFE. 3.</i> | | |
| — s. 19 | - | 690 |
| <i>See HUSBAND AND WIFE. 2.</i> | | |
| 46 & 47 Vict. c. 57, s. 19— <i>Patents, Designs, and Trade Marks</i> | - | 705 |
| <i>See PATENT.</i> | | |
| — ss. 47, 60 | - | 38 |
| <i>See COPYRIGHT. 2.</i> | | |
| — ss. 62, 64, 73 (1) | - | 137 |
| <i>See TRADE-MARK. 4.</i> | | |
| — s. 64 | - | 600 |
| <i>See TRADE-MARK. 2.</i> | | |
| — s. 87 | - | 520 |
| <i>See TRADE-MARK. 1.</i> | | |
| 47 & 48 Vict. c. 54, ss. 7, 14— <i>Yorkshire Registries</i> | - | 403 |
| <i>See MORTGAGE. 2.</i> | | |
| 47 & 48 Vict. c. 71, ss. 4, 7— <i>Intestates Estates</i> | | |
| <i>See ESCHEAT.</i> | 596 | |
| 51 & 52 Vict. c. 50— <i>Patents, Designs, and Trade Marks</i> | - | 38 |
| <i>See COPYRIGHT. 2.</i> | | |
| 51 & 52 Vict. c. 59, s. 8, sub-s. 1, clauses (a) and (b)— <i>Trustees</i> | - | 415, 626 |
| <i>See TRUSTEE. 1, 2.</i> | | |
| 51 & 52 Vict. c. 62, s. 1, sub-s. 1 (a)— <i>Preferential Payments in Bankruptcy</i> | - | 212 |
| <i>See COMPANY. 4.</i> | | |
| 53 & 54 Vict. c. 5, s. 116, sub-s. 1, clause (c)— <i>Lunacy</i> | - | 336 |
| <i>See LUNACY.</i> | | |
| 53 & 54 Vict. c. 63, s. 10— <i>Companies (Winding-up)</i> | - | 279 |
| <i>See COMPANY. 17.</i> | | |
| 54 & 55 Vict. c. 17, s. 3— <i>Charitable Trusts (Recovery)</i> | - | 811 |
| <i>See RENT-CHARGE.</i> | | |
| 54 & 55 Vict. c. 39, s. 80— <i>Stamps</i> | - | 572 |
| <i>See COMPANY. 8.</i> | | |
| 56 & 57 Vict. c. 53, ss. 26, 35— <i>Trustees</i> | - | 503 |
| <i>See TRUSTEE. 5.</i> | | |
| 57 & 58 Vict. c. 30, s. 9, sub-s. 1— <i>Finance Act</i> | | |
| <i>See REVENUE.</i> | 251 | |
| STATUTES OF LIMITATIONS. | | |
| <i>See LIMITATIONS, STATUTES OF.</i> | | |
| STAY OF PROCEEDINGS —Adding plaintiff without authority—Costs | | |
| <i>See PRACTICE. 6.</i> | | |

STREET—Recovery of expenses—"Owners" 254
See LOCAL GOVERNMENT.

TAPESTRY—Heirlooms—Executor and heir 497
See FIXTURES.

TAXATION—Solicitor's costs.
See Cases under SOLICITOR.

TENANT FOR LIFE AND REMAINDERMAN—
Apportionment—Stock in Public Company—Right of Estate of Deceased Tenant for Life to Apportionment of Dividend Partly earned before but declared after Death—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 3, 4, 5.

Stock in a public company forming part of a testator's residuary estate was settled upon trust for A. for life, and after her death "to pay transfer and assign my residuary estate and the stocks funds and securities upon which the same shall be invested unto and amongst" certain beneficiaries. After the death of the tenant for life the stock was sold "cum dividend" under an order of the Court for the purpose of distribution. This order was made in the absence of the legal personal representatives of the tenant for life. After the sale a dividend was declared and received by the purchaser in respect of profits, a portion of which had been earned prior to the death of the tenant for life:—

Held, that the estate of the tenant for life was not entitled under the Apportionment Act, 1870, to be paid out of the purchase-money of the stock anything in respect of the dividend; but, inasmuch as if the trust had been strictly carried out in accordance with the terms of the will, by transferring the investments to the beneficiaries, the representatives of the tenant for life would have been in a position, either directly or through the trustees, to obtain payment of an apportioned part of the dividend, their claim ought under the special circumstances of the case to be acceded to. *BULKELEY v. STEPHENS* - - - 241

2. — *Mortgages—Interest—Will—Devise of Onerous and Beneficial Property.*

A tenant for life of estates settled by will
Held, bound to keep down interest in respect of charges on the several parts of the estates out of the income of the whole. *FREWEN v. LAW LIFE ASSURANCE SOCIETY* - - - 511

3. — *Reversionary Property—Conversion—Apportionment between Capital and Income—Discretionary Power of Sale in Trustees—Rule in Howe v. Earl of Dartmouth (7 Ves. 137 a)—Will—Construction.*

A testator devised and bequeathed his property to trustees, upon trust for his mother for her life, with remainder to other persons. And he gave to his trustees, if and when they should consider it expedient, full power to sell and dispose of all or any part of his estate. Part of the testator's property consisted of the reversion, expectant on the death of his mother, of funds settled on her marriage of which she was tenant for life. The trustees did not convert this reversionary interest during the mother's life:—

Held, that the discretionary power of sale given by the will to the trustees excluded the application of the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137 a), and that the personal repre-

TENANT FOR LIFE AND REMAINDERMAN—
continued.

sentative of the mother was not, after her death, entitled to any part of the proceeds of the sale of the reversion. *In re PITCAIRN. BRANDRETH v. COLVIN* - - - 199

— Redemption—Consent of mortgagee as owner of limited estate - - - 808
See MORTGAGE. 3.

TENANT FOR YEARS—Rent-charge—Personal liability - - - 811
See RENT-CHARGE.

TIPPING SPOIL—Trespass by—Measure of damages - - - 538
See TRESPASS.

TRADE-MARK—Register—Change of Name of Proprietor—Register of Trade Marks—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 87.

Where a limited company being the registered owner of a trade-mark changes its name, it is the duty of the comptroller on request to substitute the new name for the old name on the register. *Ex parte NEW ORMONDE CYCLE COMPANY, LIMITED* 520

2. — *Registration—"Fancy word not in common use"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 61.*

In 1886 J. registered as a trade-mark for substances used as food or as ingredients in food the word "Bovril," which he had invented, and which up to the time of registration he had never used. He made over his business and trade-mark to a limited company. The best known of the articles sold under this mark was a fluid extract or beef, which was issued under the name of "Fluid Beef, Brand Bovril," but the article being extensively sold, and called by the public "Bovril," the company adopted this name and described it as "Bovril" in their advertisements. In 1896 a rival trader applied to expunge the word from the Register of Trade Marks on the ground that it was not a "fancy word," but as applied to articles derived from beef it was descriptive, and as to articles not so derived was deceptive:—

Held (affirming the decision of Kekewich J.), that at the time when the mark was registered "Bovril" was a "fancy word not in common use," and therefore might properly be registered as a trade-mark under the Patents, Designs, and Trade Marks Act, 1883, and that it was not a descriptive word, for although "Bov" might suggest the idea of an ox, the word as a whole would not at that time convey any meaning. *In re TRADE-MARK NO. 58,405, "BOVRIL"* - C. A. 600

3. — *Registration—Restrictions upon—"Representations of the Royal Crown"—Instructions issued by Comptroller to Persons wishing to Register Trade-marks.*

There is no positive rule binding upon the Court or the Board of Trade prohibiting the registration of a trade-mark containing the representation of a crown. The instructions issued by the Comptroller-General of Trade Marks to applicants for registration, containing a regulation that "representations of the Royal Crown" will not be registered as trade-marks or as prominent parts of trade-marks unless the marks have been

TRADE-MARK—continued.

used before August 13, 1875, do not prohibit every form of crown, but only representations of the Crown as it appears on the Royal Arms, namely, a circlet surmounted by two arches.

Whether these instructions are binding upon the Court or not, the practice in the Trade Mark Office, which has been based upon them since 1875, ought not now to be departed from. *In re KÖNIG & EBHARDT'S APPLICATION* - - 236

4. — *Registration—Words "Calculated to Deceive"—Oriental Characters—Condition—Local Limitation—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by 51 & 52 Vict. c. 50, ss. 62, 64, 73 (1).*

Held (reversing the decision of the Vice-Chancellor of the County Palatine), that the Comptroller-General of Patents, Designs, and Trade Marks was justified in refusing to register a trade-mark containing as an essential part of it words amounting to a verbal description of a mark already on the register, on the ground that their use would be calculated to deceive, though the words were in the Burmese language and character, which are little known out of Burma.

Held, by the Vice-Chancellor of the County Palatine, that the comptroller was not justified in refusing to register words in an Oriental character as part of a trade-mark for cotton goods. On appeal this point was left open.

The holder of the trade-mark containing a picture of the object referred to by the words in question consented to the application for registration:—

Held, by the Court of Appeal, that this was important only as evidence that the use of the words was not calculated to deceive, and did not preclude the comptroller from deciding otherwise.

Under s. 62, sub-ss. 4 and 5, of the Act of 1883, the Court can order the registration of a trade-mark subject to any conditions. The applicants were willing to accept a registration subject to a condition that the mark should only be put on goods sent to Burma, there being evidence that in Burma the use of the words would not be calculated to deceive:—

Held, that the Court ought not to direct registration of a trade-mark subject to a condition that it shall be used only in a particular country, such a condition not being contemplated by the Act, and being incapable of being enforced. *In re TRADE-MARK OF JOHN DEWHURST & SONS, LIMITED*

[C. A. 137]

5. — *Trade Name—Name of Article—Non-descriptive Trade-mark—"Yorkshire Relish"—Rival Maker—Use of same Name for similar Article—Misleading Ordinary Buyer—Injunction.*

For thirty-five years the plaintiff had made, from a secret recipe, and sold in round glass bottles, a sauce which he called "Yorkshire Relish," and those words were impressed into the glass of the bottles, and were printed, together with the plaintiff's name, on the labels fastened to the bottles, and without the plaintiff's name on the wrappers in which the bottles were sold. The plaintiff's trade was very large and profitable; and some years ago he had registered the words "Yorkshire Relish" as an old trade-mark of his

TRADE-MARK—continued.

own; but, after litigation with the defendants, those words had been expunged from the register. The plaintiff had, however, hitherto succeeded in preventing any person other than himself from using the words "Yorkshire Relish" to denote a sauce. The defendants had not discovered the plaintiff's secret, but they were making and selling, under the name of "Yorkshire Relish," and in bottles similar to those of the plaintiff, a sauce very like the plaintiff's sauce, and at a lower price. The defendants printed their own names on their own labels, and there were certain other differences in the labels and in the wrappers; but the evidence proved that the defendants' sauce could be, and in some instances had been, mistaken by ordinary buyers for that made by the plaintiff:—

Held, by the Court of Appeal (Lindley, Kay, and A. L. Smith L.J.J.), affirming the decision of Stirling J., that the plaintiff was entitled to an injunction to restrain the defendants from selling their sauce as "Yorkshire Relish" without better distinguishing it from the sauce made and sold by the plaintiff.

The principle on which the Court acts in determining the rights of rival manufacturers with reference to the use of trade-marks and trade names stated and explained. *POWELL v. BIRMINGHAM VINEGAR BREWERY COMPANY* - C. A. 54

TRANSFER—Certification on—Shares—Contributory - - - 757
See COMPANY. 13.

— Shares during voluntary liquidation—Contributory - - - 851
See COMPANY. 14.

TRESPASS—Damages—Trespass by tipping spoil—Injury to Land—Measure of Damages.

The defendants having trespassed on the plaintiffs' land by tipping spoil thereon from their colliery:—

Held (affirming the decision of Chitty J.), that the amount of damages was not to be assessed by ascertaining merely the diminution in value of the plaintiffs' land, but that the principle of the way-leave cases (*Martin v. Porter*, 5 M. & W. 351; *Jegon v. Vivian*, L. R. 6 Ch. 742; and *Phillips v. Homfray*, L. R. 6 Ch. 770) applied: namely, that if one person without leave of another uses the other's land for his own purposes he ought to pay for such user; and that therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used by the wrongdoers ought to be taken into account; and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiffs by reason of the wrongful acts of the defendants. *WHITTHAM v. WESTMINSTER BRYMBO COAL AND COKE COMPANY* - C. A. 538

TRUSTEE—Breach of Trust—Breach of Duty—Omission to form Fund for Annuity—Action by Annuitant against Trustee for Account—Right of Action—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1, clauses (a) and (b)—Carrying back Account—Statutes of Limitations.

The effect of s. 8 of the Trustee Act, 1888, is that except in the three following cases, fraud by the trustee, retention of trust property by him,

TRUSTEE—*continued*.

or receipt by him and conversion of it to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions or proceedings for breaches of trust were enumerated in them.

Under a will, the plaintiff, on the expiration of a term of fourteen years from the death of the testatrix (who died on May 20, 1875), became entitled to an annuity for her life. During the term it was the duty of the defendant, as trustee under the will, to receive the rents of certain devised estates, and after payment of some immediate annuities, to accumulate the surplus rents and invest the accumulations in the purchase of lands. The plaintiff's annuity was charged upon the accumulations and the lands to be purchased therewith, as well as upon the devised estates. Without any fraudulent intent the defendant, instead of accumulating the surplus rents, applied them in keeping down interest on incumbrances and in necessary repairs.

The term expired on May 20, 1889, the plaintiff's annuity fell into arrear in November, 1894, and on August 9, 1895, she brought this action for an account.

The defendant had no trust moneys in his hands at the issue of the writ, and had never converted any trust moneys to his own use; and he relied on s. 8 of the Trustee Act, 1888, but admitted that within six years before the issue of the writ he had rents in his hands which he ought to have accumulated and invested:—

Held, (1.) that the plaintiff was entitled to an account of the moneys in the hands of the defendant six years before the issue of the writ and liable to the trust for accumulation, and also to an account of the rents which ought afterwards to have been accumulated, but not to an account from the death of the testatrix; and (2.) that the case fell either within clause (a) or clause (b) of s. 8 of the Act of 1888, but (*per* Rigby L.J.) preferably within clause (a); and that whichever clause was applicable, the defendant was protected from demands more than six years before the issue of the writ.

The decision of Kekewich J. affirmed.

Sect. 8 of the Trustee Act, 1888, discussed and explained.

In re Bowden (45 Ch. D. 444) observed upon. *How v. EARL WINTERTON* — — — **C. A. 626**

2. — Contribution—Breach of Trust—Liability—Right to Contribution or Indemnity as between co-Trustees—Statute of Limitations—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (a), (b).

The principle established in *Wolmershausen v. Gullick* ([1893] 2 Ch. 514), that the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default. In such a case, therefore, time does not begin to run as between the co-trustees until the claim of the cestui que trust has been established against one of them.

The plaintiff, who was trustee of a marriage

TRUSTEE—*continued*.

settlement, allowed the trust fund to be in the hands of the defendant, his co-trustee, for investment. The defendant entrusted the whole fund to an "outside" stockbroker, who applied a portion of it to his own uses. In an action by the plaintiff and infant cestuis que trust under the settlement, the defendant denied his liability and claimed contribution against the plaintiff trustee:—

Held, (1.) that the defendant, not having exercised proper care in the selection of a broker, and having improperly left the whole amount of the trust fund in the broker's hands, was liable for the loss which had occurred; (2.) that the plaintiff was in *pari delicto* with the defendant, and that the defendant was therefore entitled to contribution from the plaintiff; and (3.) that as between the two trustees time did not begin to run under the Statutes of Limitation until the date of the judgment in the action. *ROBINSON v. HARKIN* — — — — — **415**

3. — Investment—"Company incorporated by Act of Parliament."

Where by a will made in 1895 trustees were empowered to invest in the bonds, debentures, or debenture stock of any "company incorporated by Act of Parliament":—

Held, that the trustees were not authorized to invest in securities of companies incorporated by registration under the Companies Act, 1862.

Elve v. Boyton ([1891] 1 Ch. 501) distinguished. *In re SMITH. DAVIDSON v. MYRTLE*

590

4. — Investments—Will—Power to invest on Real Securities—Executor—Trustee—Mortgages existing at Testator's Death—Retaining Investments—Depreciation—Insufficient Security—Breach of Trust—Wilful Default.

Where a will authorizes investments on mortgage of real estate, and part of the testator's estate at his death consists of mortgages of freehold farms, there is no rule that his executors and trustees are under an absolute duty, without exercising any judgment of their own in the matter, to call in the securities within twelve months from the death (unless realization is required for payment of debts, funeral and testamentary expenses, and legacies), even though some of the securities may be of a risky nature, as where, owing to agricultural depression, they have apparently become insufficient to satisfy the mortgage debts:

Nor is there any rule that trustees retaining a security authorized by their trust are liable to make good a loss sustained through the fall in value of the security, provided that in so doing they have acted honestly and prudently in the belief that they have taken the best course for all parties interested in the trust estate.

To render trustees liable in such a case, wilful default, including want of ordinary prudence, must be proved.

The duties of executors and trustees, as regards calling in mortgage debts of their testator, discussed.

Ames v. Parkinson (7 Beav. 379) distinguished. *In re CHAPMAN. COOKS v. CHAPMAN* **C. A. 763**

5. — Vesting Order—Practice—Reduction

TRUSTEE—continued.

of Number of Trustees—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 35.

Where one of four trustees was an absconding bankrupt, the Court made an order vesting the trust estate in the other three trustees, although the number of trustees was thereby diminished. *In re LEES' SETTLEMENT TRUSTS* - - - 508

— Breach of trust—Determinable life interest
See SETTLEMENT. 503

— Breach of trust—Fraud—Notice - 192
See MORTGAGE. 1.

UNDERWRITING CONTRACT—Authority to apply for shares—Removal of name from register - - - 643
See COMPANY. 10.

UNDERWRITING LETTER—Contributory 121
See COMPANY. 15.

VENDOR AND PURCHASER—Production of Documents—Document of Title missing—Expense of Searching for Documents not in Vendor's Possession—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 6.

Unless the contract for sale contains provisions inconsistent with s. 3, sub-s. 6, of the Conveyancing Act of 1881, the expense of searching for all documents not in the vendor's possession and required by the purchaser for the purpose of verifying the abstract, not excepting even the deed (e.g., an underlease), which is the root of the vendor's title, must be borne by the purchaser.

The decision of Stirling J. affirmed. *In re STUART AND OLIVANT AND SEADON'S CONTRACT* C. A. 328

— Power of sale—Charge of debts and legacies
See WILL. 4. 720

— Statute of Frauds—Vendor's name—Reference to formal contract - 737
See FRAUDS, STATUTE OF. 2.

VESTING—Gift to class at twenty-one—Maintenance - - - 711
See WILL. 5.

VESTING ORDER—Reduction of number of trustees - - - 508
See TRUSTEE. 5.

WILFUL DEFAULT—Retaining investments—Depreciation - - - 763
See TRUSTEE. 4.

WILL—Condition—Absolute Gift—Subsequent Condition—Repugnancy—Restraint on Alienation—Legacies out of Proceeds of Sale.

A testator gave his plantations in Assam, and all other his estate, to the plaintiff absolutely subject to the payment of his debts, and, after appointing her executrix, continued, "on any sale by the plaintiff of the said plantations I will and direct her to pay my brother the sum of 1000*l.* out of the proceeds of such sale, also the further sum of 500*l.* out of the proceeds of such sale to" the testator's sister:—

Held, that the direction to pay these legacies

WILL—continued.

imposed no obligation on the plaintiff to sell; and further, that this direction was repugnant and void, and that the property, therefore, belonged to the plaintiff absolutely. *In re ELLIOT. KELLY v. ELLIOT* - - - 353

2. — *Falsa Demonstratio*—Construction of Will.

A testatrix bequeathed all her shares in two specified railway companies. She never had any shares in either company, but at the date of her will she held debenture stock of each company, which she continued to hold at the time of her death:—

Held, that the debenture stock passed under the bequest. *In re WEEDING. ARMSTRONG v. WILKIN* - - - 364

3. — "Legal Disability" preventing Donee from taking the Property for his own Benefit.

A testator, subject to a life estate to his wife, gave half his residuary estate to his son; but in case the son should at the death of the wife be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," the testator gave the same over to the son's wife and children.

Shortly before the widow's death the son, who was one of the executors, was found indebted to the estate in 518*l.*, and an order was made directing him to pay that sum, and declaring his interest under the will liable to make it good. He had also heavily incumbered his interest:—

Held (affirming the decision of Stirling J.), that "legal disability" meant a disability of the person arising from act of law, and that neither the charge by the order nor the mortgages created such a legal disability as would cause the gift over to take effect.

The son on the day of his mother's death, but before her death, was adjudicated bankrupt on his own application; but in a few days the adjudication was annulled on the ground that it ought never to have been made.

Held (affirming the decision of Stirling J.), that this bankruptcy, having been a mere contrivance on the part of the son, ought not to be regarded. *In re CAREW. CAREW v. CAREW*

C. A. 311

4. — Power of Sale—Validity—Real Estate—Gift among Persons sui juris—Charge of Debts and Legacies—Trustees—Vendor and Purchaser—Title.

A testator, after directing payment of his debts, funeral and testamentary expenses, and bequeathing several legacies, gave his residuary real and personal estate to trustees, as to certain parts of his real estate, upon trusts by way of settlement; and as to the residue of his real and personal estate, he gave the same to four persons, all sui juris, absolutely. And he declared that his trustees should have power to sell his real estate at such times as they should deem expedient, and should hold the proceeds upon the trusts of his will.

The trustees, purporting to exercise their power of sale, sold part of the real estate comprised in the latter residuary gift:—

Held, as between the vendors and the pur-

WILL—*continued.*

chaser, that the power of sale was valid, not on the ground that the testator shewed any intention that it should be exercised for the purpose of division among the beneficiaries, but on the ground that the debts and legacies were charged on the real estate under the doctrine in *Greville v. Browne* (7 H. L. C. 689), and that the power of sale was intended to be exercised for the purpose of raising money to pay the same if required — *In re Lord Sudeley and Baines & Co.* ([1894] 1 Ch. 334), and cases there cited, discussed. *In re DYSON AND FOWKE* - - - 720

5. — *Vesting—Gift to a Class at Twenty-one—Maintenance—Construction of Will.*

A power given by will to trustees to apply "the whole or such part as they shall think fit" of the income of the respective shares of members of a class entitled to shares of property on attaining twenty-one:—

Held, not to vest the shares of members under twenty-one.

Fox v. Fox (L. R. 19 Eq. 286) dissented from. *In re WINTLE. TUCKER v. WINTLE* - - - 711

— Charitable bequest—"Charitable, philanthropic or" —Blank in will 451
See CHARITY. 1.

— Devise of onerous and beneficial property—Mortgages—Interest - - - 511
See TENANT FOR LIFE AND REMAINDERMAN. 2.

— Investments — Executor retaining — Insufficient security - - - 763
See TRUSTEE. 4.

WINDING-UP—Of company.
See COMPANY. 11—18.

WITNESS—Examination of, abroad—Letters of request - - - 611
See EVIDENCE.

WORDS—"Actual fraud" - - - 403
See MORTGAGE. 2.

— "Benefit" - - - 552
See HUSBAND AND WIFE. 1.

WORDS—*continued.*

— "Calculated to deceive" - - - 137
See TRADE-MARK. 4.

— "Cease to be payable" - - - 503
See SETTLEMENT. 2.

— "Company incorporated by Act of Parliament" - - - 590
See TRUSTEE. 3.

— "Discount" - - - 320
See COMPANY. 18.

— "Fancy word" - - - 600
See TRADE-MARK. 2.

— "Intestate" - - - 802
See SETTLEMENT. 1.

— "Lawfully detained" - - - 336
See LUNACY.

— "Legal disability" - - - 311
See WILL. 3.

— "Maker" - - - 157
See BILL OF EXCHANGE.

— "Member" - - - 268
See COMPANY. 7.

— "Misefeasance" - - - 279
See COMPANY. 17.

— "Next of kin in blood" - - - 802
See SETTLEMENT. 1.

— "Own consent in writing" - - - 649
See PRACTICE. 6.

— "Owners" - - - 254
See LOCAL GOVERNMENT.

— "Philanthropic" - - - 451
See CHARITY. 1.

— "Privilege" - - - 826
See PRACTICE. 1.

— "Surplus assets" - - - 750
See COMPANY. 11.

YORKSHIRE REGISTRY—Priority—Fraud 403
See MORTGAGE. 2.



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